



LAW REFORM
COMMISSION/COIMISIÚN UM
ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

MANDATORY SENTENCES

[LRC CP 66-2011]



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Law Reform Commission

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LAW REFORM COMMISSION'S ROLE

The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify and modernise the law. Since it was established, the Commission has published over 160 documents (Consultation Papers and Reports) containing proposals for law reform and these are all available at www.lawreform.ie. Most of these proposals have led to reforming legislation.

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The Commission's role also involves making legislation more accessible through three other related areas of activity, Statute Law Restatement, the Legislation Directory and the Classified List of Legislation in Ireland. Statute Law Restatement involves the administrative consolidation of all amendments to an Act into a single text, making legislation more accessible. Under the *Statute Law (Restatement) Act 2002*, where this text is certified by the Attorney General it can be relied on as evidence of the law in question. The Legislation Directory - previously called the Chronological Tables of the Statutes - is a searchable annotated guide to legislative changes. The Classified List of Legislation in Ireland is a list of all Acts of the Oireachtas that remain in force, organised under 36 major subject-matter headings.

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Full responsibility for this publication lies, however, with the Commission.

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W v Ireland	[1997] 2 IR 141	Irl	35
Weeks v United Kingdom	(1988) 10 EHRR 293	ECHR	124
Whelan and Another v Minister for Justice, Equality and Law Reform	[2007] IEHC 374, [2010] IESC 34	Irl	33
Wynne v United Kingdom	(1995) 19 EHRR 333	ECHR	124

INTRODUCTION

A Background: Request by the Attorney General on Mandatory Sentences

1. This Consultation Paper arises from a request made to the Commission on 12 October 2009 by the then Attorney General, under section 4(2)(c) of the *Law Reform Commission Act 1975*, in which the Attorney General requested the Commission:

“to examine and conduct research and, if appropriate, recommend reforms in the law of the State, in relation to the circumstances in which it may be appropriate or beneficial to provide in legislation for mandatory sentences for offences.”

2. The key matters arising from this request are, therefore, that the Commission is to examine and research existing legislation in the State concerning “mandatory sentences”, and to consider whether to recommend reforms as to the offences in which it may be “appropriate or beneficial” to provide in legislation for mandatory sentences.

3. The Attorney General’s request is clearly wide-ranging in scope. It requires the Commission, firstly, to determine the scope of the term “mandatory sentences.” In addition, the Commission is requested to consider mandatory sentences in general terms, although the Commission notes that existing legislation that already provides for mandatory sentences in connection with specific offences provides a valuable reference point for the analysis required in response to the request. The Commission’s third task is to assess whether provision in legislation for such sentences is “appropriate and beneficial.” In order to reach conclusions on that aspect of the Attorney General’s request, the Commission has examined the aims of criminal sanctions and relevant sentencing principles in the State. The Consultation Paper therefore begins in Chapter 1 with a discussion of those aims and objectives before progressing to a detailed review of existing legislation on mandatory sentences.

B Scope of the Attorney General’s Request: “Sentences,” “Offences” and General Principles of Sentencing

4. The first matter addressed by the Commission in preparing this Consultation Paper was to determine the scope of the term “sentences” in the Attorney General’s request. In this respect, the Commission notes that this can be given a narrow or a broad interpretation. In its 1996 *Report on Sentencing*,¹ the Commission defined the term by reference to the judicial role:²

“Sentencing is the judicial determination of a legal sanction to be imposed on a person found guilty of an offence.”

5. Used in this sense, “sentencing” involves a decision by a *court* as to what sanction the criminal justice system may impose on a person found guilty of an offence. By contrast, in 2006 O’Malley³ set out a broader interpretation, noting that *each branch of government* has an important role in the sentencing process:

“The Legislature, which has sole and exclusive power to make laws for the State,⁴ is responsible for the creation and definition of offences, and the enactment of laws to govern various aspects of the sentencing and penal processes. The Judiciary is responsible for the selection of punishment in each case, unless the offence or conviction carries a mandatory sentence... The Executive is responsible for the implementation of sentences. It has significant constitutional and statutory

¹ Law Reform Commission *Report on Sentencing* (LRC 53-1996).

² Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 1.1. See also Canadian Sentencing Commission, *Sentencing Reform: A Canadian Approach* (1987) at 111.

³ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006).

⁴ Article 15.2.1° of the Constitution of Ireland.

powers to commute or remit any punishment imposed by the courts, and to grant temporary release to prisoners.”⁵

6. The term “sentence” has also been given a narrow or a broad interpretation in terms of the sanctioning outcome or outcomes envisaged. Thus, section 1(1) of the *Transfer of Sentenced Persons Act 1995* defines “sentence” narrowly as:

“any punishment or measure involving deprivation of liberty ordered by a court or tribunal for a limited or unlimited period of time on account of the commission of an offence.”

7. The 1995 Act therefore limits “sentence” to mean “sentence of imprisonment.” This may be contrasted with, for example, section 106 of the *Criminal Justice Act 2006*, which provides:

“Where 2 or more sentences, one of which is a restriction on movement order, are passed on an offender by the District Court and are ordered to run consecutively, the aggregate of the period during which the order in respect of the offender is in force and the period of any term or terms of imprisonment imposed on him or her shall not exceed the maximum period of the aggregate term of imprisonment specified in section 5 of the Criminal Justice Act 1951.”

8. Section 106 of the 2006 Act therefore defines “sentence” to include not just a sentence of imprisonment but also other orders of the court made on conviction, such as a restriction on movement order. This, therefore, envisages that a “sentence” covers both custodial and non-custodial sanctions; indeed, it is notable that section 99 of the *Criminal Justice Act 2006* regulates the non-custodial suspended sentence. Other important non-custodial sentences include community service orders and fines. This broader interpretation is also evident in another aspect of the Commission’s 1996 definition of “sentencing” which refers to “a legal sanction to be imposed on a person found guilty of an offence”. An even wider concept of “sentence” would include a probation order made by the District Court under the *Probation of Offenders Act 1907* (one of the most commonly-used sanctions in the criminal justice system in Ireland), which can be made without recording a conviction.⁶ The Commission notes that this very wide definition of “sentence”, covering both custodial and non-custodial sanctions and including orders made even where a conviction has not been recorded, is consistent with the general literature on sentencing.⁷

9. The Attorney General’s request also refers to “offences” without any apparent limitation. In the context of this Consultation Paper, however, and in particular the request to consider whether mandatory sentences are “appropriate or beneficial,” the Commission considers that the Attorney General did not envisage a consideration of this by reference to all criminal offences. In this regard, the Commission notes that various terms have been used to distinguish between the most significant criminal offences and those which are less serious. Thus, the term “arrestable offence” refers to offences punishable by a term of imprisonment of 5 years or more;⁸ indictable offences are those for which the accused is entitled as of right to a trial by jury; and summary offences are those heard in the District Court, without a jury, and for which the maximum term of imprisonment permissible is generally 12 months (and/or a fine).

10. On the issue of the sentences and offences envisaged by the Attorney General’s request, therefore, the Commission has concluded that it is required to assess whether mandatory sentences “may be appropriate or beneficial” in general terms, and should not confine its review of the law to a very small group of specific offences. At the same time, bearing in mind the very wide potential scope of an examination of all “offences” and all “sentences”, the Commission concluded at an early stage of its deliberations that it should restrict the scope of its review to offences at the higher end of the criminal

⁵ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 28.01.

⁶ See generally Law Reform Commission *Report on Court Poor Box: Probation of Offenders* (LRC 75-2005).

⁷ See, for example, O’Malley *Sentencing Law and Practice* 2nd ed (Thomson Round Hall, 2006), Chapter 2; and Ashworth *Sentencing and Criminal Justice* 3rd ed (Butterworths, 2000), Chapter 3.

⁸ Section 2(1) of the *Criminal Law Act 1997* defines an “arrestable offence” as “an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty and includes an attempt to commit any such offence.”

calendar (such as murder), or which by their nature pose major risks to society (such as organised drugs offences or firearms offences), or which involve specific aspects that merit special attention (for example, consecutive offences committed by the same person). This focus would ensure that the Commission could respond to the Attorney General's request within a reasonable period of time. While the examples given here reflect the types of offences for which mandatory sentences, as described below, are currently prescribed in Ireland, the Commission has not confined its analysis to these examples.

11. Indeed, the need to look beyond existing examples is directly connected to the Commission's conclusion, already mentioned, that it should examine and review the general principles of sentencing. This involved the Commission reviewing relevant developments in the literature on sentencing since its 1996 *Report on Sentencing*,⁹ in order to provide a framework for analysing a selection of offences, including those for which mandatory sentences are currently provided. This framework of principles would in turn, the Commission considered, allow it to determine whether such mandatory sentencing provisions had been "appropriate or beneficial" and, as a consequence, allow it determine whether such provisions would be "appropriate or beneficial" in other settings.

C Scope of the Attorney General's Request: "Mandatory Sentences"

12. In addition to focusing on certain offences, the Commission also considered that, in preparing this Consultation Paper, it was necessary to determine the scope of the term "mandatory sentences." As with the other aspects of the Attorney General's request already mentioned, the term could be given a narrow or a broad interpretation. It could be limited to "entirely" mandatory sentences, such as the provision in Irish law of a mandatory life sentence for murder. Alternatively, it can encompass provisions that impose significant sentencing constraints in respect of certain offences or certain types of offender behaviour. Thus, it may be taken to include current statutory provisions that stipulate: presumptive minimum sentences, subject to stated and specific exceptions, for certain drugs and firearms offences; consecutive sentences for offences committed while on bail; and mandatory sentences for second or subsequent offences. In some jurisdictions, the term could include those provisions that indicate defined "tariffs" based on binding sentencing guidelines, as had been the case at one time at federal level in the United States.

13. The Commission has concluded that it should not confine its examination to "entirely" mandatory sentences but should review legislative provisions that set down a fixed sentence, or a minimum sentence, following conviction for a particular type of offence. Within that broad definition, a variety of mandatory sentences are already in use in Ireland.

14. The first and clearest example of a mandatory sentence is the mandatory life sentence for murder (and treason).¹⁰ Similarly, in the case of a person convicted for "capital murder" (the form of murder for which the death penalty formerly applied), a minimum sentence of 40 years imprisonment applies, and in the case of an attempt to commit capital murder a minimum sentence of 25 years imprisonment applies.¹¹

15. A second type of mandatory sentence is probably more accurately described as a "presumptive" mandatory sentence.¹² This is the type that applies to certain drugs offences¹³ and firearms offences¹⁴

⁹ Law Reform Commission *Report on Sentencing* (LRC 53-1996).

¹⁰ Section 2 of the *Criminal Justice Act 1990*.

¹¹ Section 4 of the *Criminal Justice Act 1990*.

¹² The Irish Penal Reform Trust considers these sentences are not strictly speaking mandatory sentences but are a type of presumptive sentence, in that there is a presumption that these sentences would apply unless the court considers they should not apply in a given case: see Irish Penal Reform Trust, *Position Paper on Mandatory Sentencing* (Position Paper 3, May 2009), available at www.iprt.ie. The Commission considers that, nonetheless, such sentences come within the parameters of the Attorney General's request.

¹³ Sections 15A, 15B and 27 of the *Misuse of Drugs Act 1977*, as inserted by sections 4 and 5 of the *Criminal Justice Act 1999* and further amended by section 33 of the *Criminal Justice Act 2007*.

¹⁴ Under the *Firearms Act 1925*, as amended by section 42 of the *Criminal Justice Act 2006*.

and which requires a court to apply a minimum sentence, but which also allows the court, by taking account of exceptional and specific circumstances, to impose a sentence below the presumptive minimum sentence.

16. Another type of presumptive sentence the Commission has considered in the context of the Attorney General's request is where an individual commits a second or subsequent serious offence in a 7 year period following a first serious offence, and for which the person received a sentence of 5 years or more. Irish law currently provides that, in such a case, a presumptive sentence for the second or subsequent offence is to be three quarters of the maximum sentence provided by law, or 10 years if the maximum is life imprisonment.¹⁵

17. A third category of mandatory sentence considered by the Commission is one that applies, without exception, in the case of an offender who commits a second or subsequent offence, such as the "presumptive" drugs offence already mentioned.¹⁶ This particularised treatment of recidivist offenders is also evident in the statutory provisions mandating consecutive sentences for offenders who have, for instance, committed an offence while on bail.

18. The Commission now turns to outline the content of the Consultation Paper.

D Outline of the Consultation Paper

19. In Chapter 1, the Commission considers the general aims of criminal sanctions, as well as the principles of sentencing, in order to provide a conceptual framework for the analysis of the different forms of mandatory sentences that are reviewed in detail in Chapters 2 to 4.

20. In this regard, the Commission identifies four main aims of criminal sanctions, namely (a) punishment, (b) deterrence, (c) reform and rehabilitation and (d) reparation. The Commission also identifies three key principles of sentencing, namely (a) the humanitarian principle (which incorporates respect for constitutional and international human rights), (b) the justice principle (including proportionality) and (c) the economic principle.

21. The Commission notes that the justice principle is of particular importance because it incorporates the concept of proportionality, which requires an individualised approach to sentencing, namely, that the sentencing court must have regard to the circumstances of both the offence and the offender. In this context, the Commission fully appreciates (based on the review of the relevant case law in Chapter 1) that the Supreme Court and the Court of Criminal Appeal have developed general guidance, and in some instances specific guidelines, such as the strong presumption of a custodial sentence on conviction for manslaughter and rape. These are clearly intended to provide principled-based clarity around likely sentencing outcomes, and reflect comparable developments in many other jurisdictions. The Commission notes the importance of such guidance and guidelines, bearing in mind that the Oireachtas has provided for a very wide discretion as to the actual sentence to be imposed for the majority of criminal offences, including some of the most serious offences, such as manslaughter and rape, for which the sentence can range from no custodial sentence to a maximum of life imprisonment.

22. The Commission also discusses in Chapter 1 the extensive case law in Ireland which indicates that sentencing courts are also conscious of the need to consider a wide range of aggravating factors, and mitigating factors, as well as the individual circumstances of the offender, which directly affect both the seriousness of the offence and the severity of the sentence to be imposed in an individual case. The Commission notes that this has built on the list of aggravating factors and mitigating factors, and the individual circumstances of the offender, set out in the Commission's 1996 *Report on Sentencing*.¹⁷ It is, equally, clear that the courts have also had regard to comparable case law and developments in other jurisdictions since 1996 in connection with the ongoing development of such factors.

¹⁵ Section 25 of the *Criminal Justice Act 2007*.

¹⁶ Section 27(3CCCC) of the *Misuse of Drugs Act 1977*, as inserted by section 84 of the *Criminal Justice Act 2006*, and re-numbered by section 33 of the *Criminal Justice Act 2007*.

¹⁷ Law Reform Commission *Report on Sentencing* (LRC 53-1996).

23. The Commission also notes, however, in Chapter 1 that in spite of the development and recognition of the general aims of criminal sanctions and principles of sentencing, there remain some deficiencies in the sentencing system in Ireland. The Commission has discussed the recommendations made in 2000, and reiterated in 2011, that sentencing guidance and guidelines should be developed in an even more structured manner by the proposed Judicial Council. The Commission fully supports those recommendations, and notes that such guidance and guidelines could build on the framework provided by the general aims of criminal sanctions, as well as the principles of sentencing, discussed in Chapter 1. They would also have the benefit of the guidance and guidelines available from decisions of the Supreme Court and the Court of Criminal Appeal, including those discussed in this Chapter. Such guidance could also build on the growing importance of the Irish Sentencing Information System (ISIS) which has the potential to provide a significant database of sentencing information for the courts. In this respect, the Commission agrees with the view that ISIS, which has been developed using experience with comparable databases from other jurisdictions (as discussed in Chapter 1), could in time be regarded as a leading model of its type.¹⁸

24. In Chapter 2, the Commission considers entirely mandatory sentences, of which there are only two examples in Ireland. These are the penalty for murder, under section 2 of the *Criminal Justice Act 1990*, and the penalty for murder of designated persons, under section 4 of the *Criminal Justice Act 1990*. The Commission notes that entirely mandatory sentences are applicable only to an offence considered to be at the highest end of the criminal calendar, namely, murder, and to which the death penalty would have formerly applied. The Commission considers that a mandatory life sentence for such a limited group of serious offences is consistent with the aims of criminal sanctions and the sentencing principles discussed in Chapter 1.

25. Having regard, however, to those general aims and principles, and more particularly to the decisions of the European Court of Human Rights concerning the European Convention on Human Rights (discussed in detail in Chapter 2), specific aspects of the current mandatory sentencing regime for murder are open to question on at least two grounds. First, the mandatory life sentence applies to all persons convicted of murder regardless of his or her particular circumstances or the particular circumstances of the case. In this respect, once imposed, it is unclear – bearing in mind the possibility of release by the Minister for Justice (on foot of a recommendation of the Parole Board) – how long a person serving a mandatory life sentence will, in fact, spend in prison. Second, having regard to the decisions of the European Court of Human Rights, it is difficult to see how a decision regarding release that is made by the Executive without any input from the sentencing court, often many years after the decision regarding sentencing has been made, is fully compatible with the European Convention on Human Rights. For these reasons, the Commission has provisionally concluded that the mandatory sentencing regime for murder should be amended to provide that, on the date of sentencing, the court should be empowered to indicate or recommend that a minimum specific term of imprisonment should be served by the defendant, having regard to the particular circumstances of the offence and of the offender.

26. In Chapter 3 the Commission considers “presumptive” mandatory minimum sentences, subject to exceptions in specified circumstances. There are two examples of this type of provision in Irish law. One provides the penalty for certain offences under the *Misuse of Drugs Acts* and the other provides the penalty for certain offences under the *Firearms Acts*. The Commission accepts that presumptive sentencing regimes may be suitable in narrowly prescribed circumstances where the offences have a particularly serious impact on society, such as with certain drugs offences and certain firearms offences. Having regard to the general aims and principles set out in Chapter 1, however, the Commission observes that there is a particular need to ensure that these presumptive sentencing regimes are achieving their stated objectives. The Commission notes in Chapter 3 that one objective was to increase the severity of sentencing and that another objective was to deter offenders. While the presumptive sentencing regimes may have succeeded in increasing the severity of sentencing for certain drugs and firearms offences, the Commission concludes that it is arguable, at least in respect of the regime under the *Misuse of Drugs Acts*, that it has not reduced the level of criminality.

¹⁸ See, generally, O'Malley, *Sentencing: Towards a Coherent System* (Thomson Reuters, 2011), and O'Malley “Creativity and Principled Discretion over Sentencing a Necessity”, *The Irish Times*, 19 December 2011.

27. The Commission has, therefore, concluded that the presumptive sentencing regime, as it applies in the case of certain drugs and firearms offences, should not be extended to any other offences but should be reviewed because, while it has succeeded in one objective, namely, an increased severity in sentencing for certain drugs and firearms offences, it has not been established that it has achieved another general aim of the criminal justice system, namely reduced levels of criminality. The Commission notes that, instead, the presumptive drugs offences regime (on which the effects in practice are, in particular, clear) has had the following results: a discriminatory system of sentencing where all cases are treated alike regardless of differences in the individual circumstances of the offenders; the adaptation of the illegal drugs industry to the sentencing regime by using expendable couriers to hold and transport drugs; that these relatively low-level offenders, rather than those at the top of the drugs industry, are being apprehended and dealt with under the presumptive regime; a high level of guilty pleas in order to avoid the presumptive minimum sentence; and a consequent bulge in the prison system comprising low-level drugs offenders.

28. In Chapter 4 the Commission considers mandatory sentences for second or subsequent offences. There are three examples of this type of provision in Irish law. These concern convictions for second or subsequent offences under the *Criminal Justice Act 2007*, the *Misuse of Drugs Act 1977* and the *Firearms Acts*. In addition, the Commission considers similar provisions under the *Criminal Justice Act 1984* and the *Criminal Law Act 1976*, which mandate consecutive sentencing for recidivist offenders. The Commission considers that there are significant reasons to lead to the conclusion that there should be no extension of the existing statutory framework concerning the imposition of mandatory sentences (and, where relevant, presumptive mandatory sentences) for second or subsequent offences. Indeed, these reasons are comparable to those already discussed by the Commission in connection with the presumptive regime for drugs and firearms offences. Nonetheless, the Commission also considers that, as a general proposition, a statutory framework that takes account in sentencing of repeat offending is consistent with the general aims of the criminal justice system and principles of sentencing set out in Chapter 1.

29. Chapter 5 contains a summary of the provisional recommendations made in the Consultation Paper.

30. This Consultation Paper is intended to form the basis for discussion and therefore all the recommendations are provisional in nature. The Commission will make its final recommendations on the subject of mandatory sentences following further consideration of the issues and consultation. Submissions on the provisional recommendations included in this Consultation Paper are welcome. To enable the Commission to proceed with the preparation of the Report, which will contain the Commission's final recommendations in this area, those who wish to do so are requested to make their submissions in writing to the Commission or by email to info@lawreform.ie by **30 April 2012**.

CHAPTER 1 CONCEPTUAL FRAMEWORK FOR CRIMINAL SANCTIONS AND SENTENCING

A Introduction

1.01 The Commission's review of mandatory sentences in response to the Attorney General's request requires an examination of the conceptual framework for criminal sanctions in general. Thus, in this chapter, the Commission considers the aims of criminal sanctions and the principles which regulate how these aims may be pursued. In this regard, it is useful to begin with an examination of the leading Irish case on sentencing, the 1972 decision of the Court of Criminal Appeal in *The People (Attorney General) v Poyning*¹.

1.02 In *Poyning* the defendant was arraigned in the Circuit Court on an indictment of which the first count charged him with having committed an armed robbery, contrary to section 23(1)(a) of the *Larceny Act 1916*, and the fifth count charged him with having taken a motor car without authority, on the same occasion, contrary to section 112 of the *Road Traffic Act 1961*. He pleaded guilty to both counts and he was sentenced to four years' imprisonment on the first count and 6 months' imprisonment on the fifth count. He was also disqualified from holding a driving licence for 10 years. Two other men were also charged with having committed armed robbery with the defendant and their trial was transferred to the Central Criminal Court where each of them pleaded guilty and was sentenced to 6 years' imprisonment. However, in the case of both of those defendants the term of imprisonment was suspended upon condition that the defendants entered into a bond to keep the peace for five years and each of them was released. In those circumstances the defendant appealed against the sentences imposed on him.

1.03 At the hearing of the appeal counsel for the defendant argued that the result was "a gross inequality of treatment for his client". Giving its judgment the Court of Criminal Appeal stated:

"The law does not in these cases fix the sentence for any particular crime, but it fixes a maximum sentence and leaves it to the court of trial to decide what is, within the maximum, the appropriate sentence for each criminal in the particular circumstances of each case. Not only in regard to each crime but in regard to each criminal the court of trial has the right and the duty to decide whether to be lenient or severe. It is for these reasons and with these purposes in view that, before passing sentence, the court of trial hears evidence of the antecedents and character of every convicted person. *It follows that when two persons are convicted together of a crime or of a series of crimes in which they have been acting in concert, it may be (and very often is) right to discriminate between the two and to be lenient to the one and not to the other.* The background, antecedents and character of the one and his whole bearing in court may indicate a chance of reform if leniency is extended; whereas it may seem that only a severe sentence is likely to serve the public interest in the case of the other, having regard both to the deterring effect and the inducement to turn from a criminal to an honest life. When two prisoners have been jointly indicted and convicted and one of them receives a light sentence, or none at all, it does not follow that a severe sentence on the other must be unjust."² (emphasis added)

1.04 The Court also added:

"Of course, in any particular case the Court must examine the disparity in sentences where, if all other things were equal, the sentences should be the same; it must examine whether the differentiation in treatment is justified. The Court, in considering the principles which should

¹ [1972] IR 402.

² [1972] IR 402, at 408.

inform a judge's mind when imposing sentence and having regard to the differences in the characters and antecedents of the convicted person, will seek to discover whether the discrimination was based on those differences."³

1.05 In effect, therefore, *Poyning* establishes the principle that sentencing must be individualised in so far as a criminal sanction must be proportionate to the particular circumstances of (a) the crime and (b) the convicted person. Thus where, as in this case, each defendant has committed the same crime, the criminal sanction for each may be different because the individual circumstances of each defendant ("background, antecedents and character") are different. In *Poyning*, the Court also referred, in passing, to a number of aims of the sentencing process, including "a chance of reform", "the public interest" and "the deterring effect".

1.06 The Commission observes that while *Poyning* provides a useful insight into the conceptual framework for criminal sanctions, it does not, however, provide a complete picture. There are many other matters which should be considered as forming part of the conceptual framework, both in terms of the aims of criminal sanctions and the principles which delimit the means by which these aims may be pursued. Each will be considered in turn.

B Aims of Criminal Sanctions

1.07 Just as the debate regarding mandatory sanctions cannot be examined without regard being had to the conceptual framework for criminal sanctions, the aims of criminal sanctions cannot be examined without regard being had to the broader aims of the criminal justice system. At a theoretical level, the criminal justice system replaces private retaliation with public adjudication so that criminal sanctions may be imposed by reference to objective criteria rather than the desires of individual victims.⁴ At a practical level, the criminal justice system seeks to reduce prohibited or unwanted conduct, namely, crime.⁵ These broader aims provide the backdrop against which the Commission examines the more specific aims of criminal sanctions.

1.08 The Commission notes that there are divergent views as to why a criminal sanction should pursue any aim at all. Walker and Padfield assert that it is because societies which value individuals' freedom regard the infliction of something to which a person objects as morally wrong unless it can be morally justified.⁶ Cavadino and Dignan, on the other hand, assert that it is because deliberately inflicted punishment, which is invariably harmful, painful or unpleasant, is *prima facie* immoral and thus requires special justification.⁷ There is also the constitutional and international human rights dimension under which any interference with a person's human rights should be limited in so far as it must be defined by law, *pursue a legitimate aim* and be necessary in a democratic society. The Commission observes that the reason why a criminal sanction should pursue one or more aims may derive from a combination of these reasons.

1.09 As was observed in the Commission's 1996 *Report on Sentencing*, the aims of sentencing may be divided into two broad categories: the moral category and the utilitarian category.⁸ The moral category, with which retributivism is traditionally associated, covers those aims which concentrate on past activity and argue that justice requires retribution to be exacted for blameworthy conduct. By contrast, the utilitarian category, with which rehabilitation, deterrence and incapacitation are traditionally associated, covers those aims which concentrate on future beneficial consequences of the imposition of sanctions

³ *Ibid.*

⁴ O'Malley "Sentencing Values and Sentencing Structures" [2003] JSIJ 130 at 140; McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet and Maxwell, 2000) at 60; Walker "The Aims of a Penal System" *The James Seth Memorial Lecture 1966* (Edinburgh University Press, 1966) at 3.

⁵ Walker "The Aims of a Penal System" *The James Seth Memorial Lecture 1966* at 4-6.

⁶ Walker and Padfield *Sentencing: Theory, Law and Practice* (Butterworths, 2nd ed, 1996) at paragraph 9.7.

⁷ Cavadino and Dignan *The Penal System - An Introduction* (Sage Publications, 3rd ed, 2002) at 33.

⁸ LRC *Report on Sentencing* (LRC 53-1996) at paragraph 2.1.

and promote themselves in terms of social utility including crime prevention and control. In addition, the Commission notes that reform, rehabilitation and reparation may be distinguished from punishment and deterrence in so far as reform, rehabilitation and reparation derive from the religious view of redemption which provides that a person who breaks the law must be punished but also saved. These categories are, broadly speaking, aligned with the broader aims of the criminal justice system, namely, the prevention of unofficial retaliation and the reduction of crime.

1.10 Bearing these factors in mind and having regard to the Department of Justice and Equality's 2010 *Discussion Document on Criminal Sanctions*,⁹ the Commission has identified a number of aims of criminal sanctions which will form the basis for its analysis of mandatory sentences in Chapters 2, 3 and 4. These include punishment, deterrence, reform and rehabilitation, and reparation.¹⁰ Reference will also be made to incapacitation which is not, strictly speaking, considered to be a purpose of Irish sentencing law.

(1) Punishment

1.11 In its 2010 *Discussion Document on Criminal Sanctions*¹¹ the Department of Justice and Equality listed "punishment" as an aim of criminal sanctions and defined it as "to inflict some kind of loss on the offender and give formal public expression to the unacceptability of the behaviour in the community".¹² Thus "punishment" is understood as the infliction of loss and the public expression of disapproval. By using the conjunction "and", the Department indicates that two separate ideas are at issue. In this regard, the Commission notes that the term "loss" is indicative of retributivist theories while "public expression" must refer to denunciation. Retribution and denunciation will now be considered in turn.

(a) Retribution

1.12 The original meaning of retribution was to "pay back" a debt or tax.¹³ Later it came to mean rewarding a good act with a benefit and a bad one with harm.¹⁴ Within the conceptual framework of criminal sanctions the retributive justification for a penalty is linked to what a person has done rather than what he will do, as in the case of deterrence. The "re" in retribution points to the past and it must be reflected in what is being done now. Thus there must be some sort of equivalence between the gravity of the harm and the penalty imposed.¹⁵ However, a retributive theory of punishment does not necessarily indicate with any degree of precision how much punishment should be imposed for any particular offence.¹⁶ It is mainly concerned with why punishment should be imposed - because it is deserved.

1.13 In this regard, however, retribution should be distinguished from vengeance. O'Malley refers to the judgment of Lamer CJ in the Canadian Supreme Court decision of *R v M (CA)*:¹⁷

⁹ Department of Justice, Equality and Law Reform, *White Paper on Crime*, "Criminal Sanctions" Discussion Document No 2 (February, 2010).

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² By contrast, the 2001 *Halliday Report* identifies punishment as one of three aims - punishment, crime reduction and reparation - pursued by criminal sanctions. In this context, "crime reduction" includes deterrence, incapacitation, reform and rehabilitation. The Report observes, however, that opinions differ as to whether punishment is a purpose in its own right or simply a means of achieving the other two purposes. In this regard, see *Making Punishments Work - Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001), at paragraph 1.4-1.5.

¹³ Walker *Why Punish?* (Oxford University Press, 1991) at 69ff.

¹⁴ Walker and Padfield *Sentencing: Theory, Law and Practice* (Butterworths, 2nd ed, 1996) at paragraph 9.8 ff.

¹⁵ Walker *Why Punish?* (Oxford University Press, 1991) at 96 ff.

¹⁶ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 2-07.

¹⁷ [1996] 1 SCR 500, 80.

“Vengeance, as I understand it, represents an uncalibrated act of harm upon another, frequently motivated by emotion and anger, as a reprisal for harm upon oneself by that person. Retribution in a criminal context, by contrast, represents an objective, reasoned and measured determination of an appropriate punishment which properly reflects the moral culpability of the offender, having regard to the intentional risk-taking of the offender, the consequential harm caused by the offender, and the normative character of the offender’s conduct. Furthermore, unlike vengeance retribution incorporates a principle of restraint; retribution requires the imposition of a just and appropriate punishment and nothing more.”¹⁸

1.14 Furthermore, in the Supreme Court decision in *People (DPP) v M*¹⁹ Denham J observed:

“Sentencing is neither an exercise in vengeance, or retaliation by victims on a defendant. However, the general impact on victims is a factor to be considered by the Court in sentencing... The nature of the crime and the personal circumstances of the appellant are the kernel issues to be considered and applied in accordance with the principles of sentencing, for this is an action between the State and the appellant and not an action between the appellant and the victims.”²⁰

1.15 The majority of the Commission made a similar observation in its 1996 *Report on Sentencing*,²¹ which was to the effect that retribution may, in fact, prevent victims from taking the law into their own hands by providing them with a “safety-valve”.²² This accords with the theory that a criminal justice system should prevent unofficial retaliation and reduce unwanted or prohibited conduct. It also links in with the idea that punishment should have an expressive or denunciatory dimension.

1.16 It should be noted, however, that there are several versions of retributivism.²³ In its most basic form, retributivism asserts that the penal system should be designed to ensure that offenders atone by suffering for their offences.²⁴ Compromising retributivism asserts that the penal system should be designed to exact atonement in so far as this would not impose excessive unofficial retaliation or inhumane suffering, and in so far as it would not increase the incidence of the offences.²⁵ Limiting retributivism asserts that criminal sanctions should not be designed with atonement in mind but their severity should be limited by retributive considerations.²⁶ In other words, the unpleasantness of a criminal sanction should not exceed the limit that is appropriate to the culpability of the offence. Thus the length of a period of imprisonment should be such as to maximise the prospects of an offender’s reform, or protect society against the offender if his or her prospects of reform are small, so long as it is not too heavy a price to pay for the offence.²⁷ A fourth version, which surrenders the idea that penal measures should be designed with atonement in mind and the idea that there should be a retributively appropriate limit to their

¹⁸ *R v M (CA)* [1996] 1 SCR 500, paragraph 80.

¹⁹ [1994] 3 IR 306.

²⁰ *People (DPP) v M* [1994] 3 IR 306, 317.

²¹ Law Reform Commission *Report on Sentencing* (LRC 53-1996).

²² Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 2.13.

²³ Walker “The Aims of a Penal System” *The James Seth Memorial Lecture 1966* at 7ff.

²⁴ *Ibid* at 7.

²⁵ Walker “The Aims of a Penal System” *The James Seth Memorial Lecture* at 8. Walker observes that this version of retributivism accords with Montero’s aim (the penal system should protect offenders and suspected offenders against unofficial retaliation); the reductivist aim (the penal system should reduce the frequency of the types of behaviour prohibited by the criminal law); and the humanitarian principle (the penal system should be such as to cause the minimum of suffering, whether to offenders or others, by its attempts to achieve its aims).

²⁶ *Ibid* at 18.

²⁷ *Ibid* at 18-19.

severity, asserts that society has no right to apply an unpleasant measure to someone against his or her will unless he or she has intentionally done something prohibited.²⁸

1.17 It is the third version of retribution that is closest to the modern theory of “just deserts”, which asserts that punishment should be proportionate, rather than equal, to the crime.²⁹ It has been observed, however, that one should be realistic about the extent to which just deserts may successfully limit punishment.³⁰ In this regard, it has been asserted that in the absence of sentencing guidelines or formal standards, it is difficult to determine when a sentence is actually proportionate to the particular crime or the circumstances of the particular offender.³¹

1.18 A further weakness of the retributive theory is that it justifies the imposition of criminal sanctions on the basis of two presuppositions.³² The first presupposition is that the criminal is free in the criminal act and has a choice, and that he or she can thus be held responsible. The second presupposition is that the crime disturbs a social order which is just in relevant respects and that the imposition of a criminal sanction restores the balance of rights disrupted by the crime. It has been noted, however, that there are many situations in which one or both of these conditions is not met - either the criminal cannot be held responsible or the order or relations in society is not just.³³ In this regard, it has been recognised that social disadvantage is at the root of much offending³⁴ and that there is thus a “dilemma of justice in an unjust world”.³⁵

1.19 The Commission observes that retribution is an important aspect of the debate regarding mandatory sentencing provisions. In its *1993 Consultation Paper on Sentencing*³⁶ the Commission considered “just deserts” within the particular context of mandatory sentencing.³⁷ It observed that support for mandatory minimum sentences had been “fuelled by distrust of judges” whose sentencing practice appeared to give more weight to mitigating factors than just deserts.³⁸ The Commission observed that this was a particularly galling prospect for rape victims who had undergone the impersonal ordeal of a rape trial in order to ensure that rapists were seen to get their “just deserts”, before stating:

“[t]hese concerns underline the importance of securing the primacy of the ‘just deserts’ approach by statute, with due regard for mitigating factors, at the heart of a new sentencing scheme and of supporting this approach by giving the prosecution the right of appeal against inadequate sentences.”³⁹

²⁸ *Ibid* at 20.

²⁹ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-07; *Report on Sentencing* (LRC 53-1996) at paragraph 2.20.

³⁰ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-09.

³¹ *Ibid*.

³² Riordan “Punishment in Ireland: Can We Talk about It?” in O'Mahony (Ed) *Criminal Justice in Ireland* (Institute of Public Administration, 2002) at 564-565.

³³ Riordan “Punishment in Ireland: Can We Talk about It?” in O'Mahony (Ed) *Criminal Justice in Ireland* (Institute of Public Administration, 2002) at 564-565; O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-09.

³⁴ Ashworth *Sentencing and Criminal Justice* (Butterworths, 2000) at 73-74.

³⁵ Cavender “Justice, Sanctioning, and the Justice Model” in Priestley and Vanstone (Eds) *Offenders or Citizens? Readings in Rehabilitation* (Willan Publishing, 2010) at 175.

³⁶ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993).

³⁷ *Ibid* at paragraph 10.61.

³⁸ *Ibid*.

³⁹ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 10.61.

The Commission concluded that the mandatory sentence was a blunt instrument which could not be tolerated in any sentencing scheme with the slightest sensitivity to a just deserts approach.⁴⁰ It should be noted, however, that while this was the view of the Commission in 1993, it does not necessarily follow that the Commission today would hold the same view on the primacy of retribution within the conceptual framework for criminal sanctions.

(b) Denunciation

1.20 To explain the term “denunciation”, O’Malley⁴¹ cites the Canadian Supreme Court decision in *R v M (CA)*:⁴²

“The objective of denunciation mandates that a sentence should communicate society’s condemnation of that particular offender’s conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender’s conduct should be punished for encroaching on our society’s basic code of values as enshrined in our substantive criminal law.”⁴³

Thus, by virtue of the principle of denunciation, the imposition of criminal sanctions is understood to be a medium through which society may collectively express its intolerance of certain types of behaviour.

1.21 There is debate, however, as to whether denunciation is a means to an end or an end in itself.⁴⁴ As a means to an end, it is asserted that denunciation deters offenders and potential offenders from committing the same or similar offences. As an end, it is asserted that denunciation provides members of society with an expressive safety valve so that they will not feel the need to take the law into their own hands. While one must be realistic as to the extent to which denunciation might achieve either of these results,⁴⁵ the Commission observes that these aspects of the theory accord with the idea that a criminal justice system should prevent unofficial retaliation and reduce unwanted or prohibited conduct.

1.22 A weakness of the theory of denunciation is that it does not necessarily engender proportionality considerations.⁴⁶ Thus a relatively severe criminal sanction might conceivably be used to express society’s abhorrence of a relatively minor offence. Denunciation and proportionality are not, however, entirely incompatible, at least to the extent that the Oireachtas, in stipulating maximum penalties, is entitled to have regard to the need for denunciation. Similarly, the courts, when imposing sentences having regard to that maximum, are effectively implementing this denunciation policy. That said, criminal sanctions that are excessive in light of the gravity of the offence and the circumstances of the offender should not be imposed solely for the purpose of denouncing the conduct constituting the offence.

1.23 The Commission observes that denunciation is an important aspect of the debate regarding mandatory sentencing provisions. The offences for which mandatory provisions have been enacted tend to be those offences which have a particularly deleterious impact on society, for example murder, drug trafficking, firearms offences and repeat offences. Confronted by such offences, individual members of society often feel victimised and powerless. It is thus understandable that individuals should wish to *collectively* express their condemnation of such offences.

⁴⁰ *Ibid.*

⁴¹ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-25.

⁴² [1996] 1 SCR 500.

⁴³ *R v M (CA)* [1996] 1 SCR 500, paragraph 81; cited with approval by the court in *R v Latimer* [2001] 1 SCR 3 at 41

⁴⁴ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-25; and Walker “The Aims of a Penal System” *The James Seth Memorial Lecture 1966* (Edinburgh University Press, 1966) at 27.

⁴⁵ Walker “The Aims of a Penal System” *The James Seth Memorial Lecture 1966* (Edinburgh University Press, 1966) at 25ff.

⁴⁶ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-25.

(2) **Deterrence**

1.24 In its 2010 *Discussion Document on Criminal Sanctions*⁴⁷ the Department of Justice and Law Reform listed “deterrence” as an aim of criminal sanctions and defined it as “to impose a penalty to either deter the individual from committing further crimes or to deter others from imitating criminal behaviour”. In other words, deterrence may be specific or general in nature. A penalty motivated by a policy of specific deterrence is concerned with the particular offender and aims to impress upon him or her the punishment he or she will suffer if he or she re-offends.⁴⁸ By contrast, a penalty motivated by a policy of general deterrence aims to demonstrate to potential offenders and society at large that painful consequences will result from any offending.⁴⁹ In this regard, in particular, the aim of deterrence accords with the broader aims of the criminal justice system, namely, the prevention of unofficial retaliation and the reduction of crime.

1.25 McAuley and McCutcheon assert that punishment and deterrence are inherently linked.⁵⁰ Deterrence is not one of several competing aims any one of which, depending on prevailing policy considerations, might be given preference. Rather, punishment is by nature deterrent such that what is done to offenders in the name of punishment must be deterrent if it is to be considered punishment at all. The authors assert that this conclusion withstands even the claim that the high rate of recidivism proves that deterrent penalties are not, in fact, effective. They argue that the effectiveness of deterrent penalties should be measured in terms of their impact on those at whom it is directed, the population as a whole, rather than on those who repeatedly break the law.⁵¹ They cite Kenny in support of this argument:

“Those who commit even a first crime have thereby shown themselves to be less deterrable than the rest of the population: they are therefore a biased sample to choose for study. The only empirical way to study the deterrent effect of punishment would be to compare the effects of two laws in parallel jurisdictions on the same type of subject matter, one of which had a sanction attached and the other did not. Naturally, it is difficult to find legislatures foolish enough to provoke circumstances in which such statistics can be collected... [Similarly] sceptics about deterrence have often concentrated their attention on particular crimes such as murder and particular punishments such as the death penalty. Murder appears to be an uncharacteristic crime in being less affected than other offences by variations in penal practice. Naturally, there are no statistics for jurisdictions where murder goes unpunished; hence the murder statistics can at most tell us about the effectiveness of different penalties, not about the effectiveness of punishment as such.”⁵²

1.26 A question arises as to which aspect of a criminal sanction is more likely to deter: the *certainty* of punishment or the *severity* of punishment. In its 1993 *Consultation Paper on Sentencing*⁵³ the Commission indicated that the *certainty* of punishment was more likely to have a deterrent effect than the *severity* of punishment.⁵⁴ The Commission notes, however, that there are a number of other factors

⁴⁷ Department of Justice, Equality and Law Reform, *White Paper on Crime*, “Criminal Sanctions” Discussion Document No 2 (February, 2010).

⁴⁸ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-11

⁴⁹ *Ibid* at paragraph 2-11

⁵⁰ McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) at 104.

⁵¹ *Ibid*.

⁵² Kenny *Freewill and Responsibility* (London, 1978) at 77.

⁵³ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993).

⁵⁴ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 4.42. See also O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-13. See also Gabor and Crutcher “Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures” rr2002-1e (Research and Statistics Division, Department of Justice of Canada, 2002) at paragraph 4.1.

which may affect the extent to which a criminal sanction deters.⁵⁵ These include the nature of the crime,⁵⁶ the target group of the particular criminal sanction;⁵⁷ the extent to which the offending behaviour attracts moral condemnation;⁵⁸ the extent to which the public has knowledge of the criminal sanction; the swiftness of punishment;⁵⁹ and perceptions as to the risk of incurring the criminal sanction.⁶⁰ Gabor and Crutcher observe that it is thus not possible to make “simplistic, sweeping generalizations affirming the presence or absence of a deterrent effect”.⁶¹

1.27 Like the aim of punishment, however, it has been observed that deterrence does not necessarily engender proportionality considerations.⁶² Thus a severe criminal sanction might conceivably be imposed for a relatively minor offence in order to deter. It has also been noted that deterrence, to the extent that it relates to general deterrence, may succumb to the criticism that it treats offenders instrumentally rather than as autonomous beings entitled to respect for their individual rights.⁶³

1.28 The Commission observes that deterrence is an important aspect of the debate regarding mandatory sentencing provisions. Deterrence is often advanced as a justification for the enactment of mandatory sentencing provisions. It is unclear, however, to what extent, if any, mandatory sentences actually deter. Some writers assert that mandatory sentences are ineffective as deterrents. Mandatory death sentences, for instance, have never been fully effective in preventing murder.⁶⁴ Other writers note, however, that crimes like murder are exceptional in so far as they often committed in “the heat of the moment when the perpetrators are in no mood to contemplate the legal consequences”.⁶⁵ In its 1993 *Consultation Paper on Sentencing*⁶⁶ the Commission stated that it found no evidence to suggest that mandatory minimum sentences acted as a deterrent.⁶⁷ Tonry cites research which, he asserts, establishes that mandatory sentences have either no demonstrable deterrent effects or short-term effects

⁵⁵ Gabor and Crutcher “Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures” rr2002-1e (Research and Statistics Division, Department of Justice of Canada, 2002) at paragraph 4.3.1.

⁵⁶ Gabor and Crutcher refer to a study (Zedlewski, 1983) which found that the increased certainty of arrested helped lower the burglary rate but had little effect on the larceny rate.

⁵⁷ Gabor and Crutcher refer to a number of studies (Greenfield, 1985; Wu and Liska, 1993) which found that more persistent offenders and those who had been punished in the past were less likely to be deterred by the threat of punishment and each ethnic group tended to respond to the probability of arrest in relation to one of its members than in relation to society at large.

⁵⁸ Gabor and Crutcher refer to a study (Grasmick, Bursik and Arneklev, 1993) which found that those who will experience shame or embarrassment as a result of their involvement in a crime are less likely to commit that crime.

⁵⁹ Gabor and Crutcher refer to a study (Howe and Brandau, 1988) and indicate that, while little evidence exists in relation to this factor, learning theories suggest that the more swiftly punishment follows crime, the lower the likelihood that the crime will be repeated.

⁶⁰ Gabor and Crutcher refer to a study (Klepper and Nagin, 1989) and indicate that, generally, those who believe they are likely to be caught and punished are less likely to commit a criminal act.

⁶¹ Gabor and Crutcher “Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures” rr2002-1e (Research and Statistics Division, Department of Justice of Canada, 2002) at 8, at paragraph 4.3.1.

⁶² O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-11; Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 66.

⁶³ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-14.

⁶⁴ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-12.

⁶⁵ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-12.

⁶⁶ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993).

⁶⁷ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 10.26.

that are quickly extinguished.⁶⁸ Furthermore, he observes that there has been little impact on the crime rates of the states in the United States in which mandatory sentences have been introduced.⁶⁹

(3) **Reform and Rehabilitation**

In its 2010 *Discussion Document on Criminal Sanctions*⁷⁰ the Department of Justice and Equality listed “rehabilitation” as an aim of criminal sanctions and defined it as “designed to include measures which might contribute to the person desisting from future offences and to assist in their reintegration into society”. Rehabilitation thus asserts that an offender detained in prison can be reformed and re-introduced into society. In this regard, the aim of reform and rehabilitation accords with the aim of the criminal justice system that crime be reduced.

1.29 While support for this concept has waxed and waned, the judicial mood regarding the effectiveness of rehabilitation in the 1990s was summarised in the judgment of Egan J. in *People (DPP) v M*.⁷¹

“[A]n essential ingredient for consideration in the sentencing of a person upon conviction, in any case in which it is reasonably possible, is the chance of rehabilitating such person so as to re-enter into society after a period of imprisonment.”⁷²

As will be discussed at paragraph 1.129, this judgment also supports the view that the possibility of rehabilitation is a factor which should be considered by a sentencing court when determining the severity of a sentence to be imposed.

1.30 Rehabilitation has been described as “an idea and an ideal; it is a theory and it is a practice”.⁷³ At one level, the macro level, there is a clash of ideologies between punishment and reform. In the United States of America and in England and Wales that argument has been settled comprehensively in favour of punitive responses to crime – in other words, in favour of the punishment of the offender as opposed to the reform of the offender.⁷⁴ At the other level, the micro level, there have been disagreements within the rehabilitation camp itself as to how best to achieve the ideal – increasingly the arguments have centred on questions of evidence that rehabilitation actually works.⁷⁵ In its 1996 *Consultation Paper on Sentencing*,⁷⁶ for instance, the Commission noted that there was serious doubt as to whether or not rehabilitation worked.⁷⁷

1.31 In the 2009 *Report of the Sentencing Advisory Panel (England and Wales)* on public attitudes to the principles of sentencing, a public survey rated rehabilitation fourth on a scale of importance of sentencing objectives, behind public protection, preventing crime, and punishing offenders⁷⁸ - though

⁶⁸ Tony *Sentencing Matters* (Oxford University Press, 1996) at 135ff. He indicates the real reason for enacting mandatory sentencing provisions is not deterrence: “Supporters of mandatory penalties in anxious times are concerned with political and symbolic goals.” At 159-160.

⁶⁹ *Ibid* at 137-139.

⁷⁰ Department of Justice, Equality and Law Reform, *White Paper on Crime*, “Criminal Sanctions” Discussion Document No 2 (February, 2010).

⁷¹ [1994] 3 IR 306.

⁷² *People (DPP) v M* [1994] 3 IR 306, 314.

⁷³ Priestley and Vanstone *Offenders or Citizens? Readings in Rehabilitation* (Willan, 2010) at 107.

⁷⁴ *Ibid*.

⁷⁵ *Ibid*.

⁷⁶ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993).

⁷⁷ *Ibid* at paragraph 10.26.

⁷⁸ Question: “I am going to read these purposes to you, and I would like you to rate the importance of each purpose in general, using a 10 point scale where 1 means not at all important and 10 means most important. How important is: *Punishing offenders for their crimes; Preventing crime – for example by deterring offenders*

73% of respondents rated rehabilitation of high importance.⁷⁹ The Advisory Panel observed that, while the level of public support for different sentencing purposes changes according to the nature and seriousness of the offence, support for rehabilitation remained high even for serious offences.⁸⁰ The report concluded that, while public protection emerged as the sentencing purpose to which the highest proportion of people attached primacy, no particular sentencing objective could be singled out as attracting significantly higher levels of support than others. The findings demonstrated the need – from the perspective of the public at least – to have multiple sentencing objectives so that these may be tailored to the specific circumstances of individual cases.⁸¹

1.32 It has been asserted that there is now substantial evidence that rehabilitation programmes, such as “prison-based therapeutic community treatment of drug-involved offenders” and “in-prison therapeutic communities with follow-up community treatment”, work with at least some offenders in some situations.⁸² These programmes are intensive, behaviour-based programmes that target an offenders’ drug use, a behaviour that is clearly associated with criminal activities. Programmes which, apparently, did not work included correctional programmes such as those which increase control and surveillance in the community, for example intensive, supervised probation or parole; home confinement; community residential programs; and urine testing. Collectively these sanctions are described as “alternative punishments” or “intermediate sanctions”.⁸³

1.33 Some commentators have been less enthusiastic about the rehabilitative ideal, saying that “it is generally accepted that rehabilitation does not work”⁸⁴ and even to the extent that it could be shown to work it cannot be “rationally defended as a legitimate aim of punishment.”⁸⁵ In this regard, it has been argued that the principle of rehabilitation, to the extent that it holds that punishment should be tailored to the needs of reforming offenders, cannot be justified.⁸⁶ The history of the criminal law illustrates that punishment - the object of which is to prevent people from *becoming* criminals - is essentially a transaction between the State and citizens generally.⁸⁷ Thus the rehabilitative theory, which regards punishment as a transaction between society and those who have *already become* criminal, is inconsistent with this theory.⁸⁸

and potential offenders; Reforming and rehabilitating offenders; Protecting the public; Reparation, i.e., getting offenders to make amends to the victim and/or the community. Base: 1,023 respondents.

⁷⁹ *Report on Public Attitudes to the Principles of Sentencing* (Sentencing Advisory Panel, 2009) at 13.

⁸⁰ *Report on Public Attitudes to the Principles of Sentencing* (Sentencing Advisory Panel, 2009) at 13.

⁸¹ *Ibid* at 16-17.

⁸² MacKenzie “What Works. What doesn’t Work. What’s Promising” in Priestley and Vanstone (Eds.) *Offenders or Citizens? Readings in Rehabilitation* (Willan, 2010) at 245.

⁸³ Robinson and Gaynor argue that there is everything to gain, or at least little to lose, by continuing to articulate a distinctive role and vision for a revitalised probation service (in the United States of America) which would “gain much from an increased emphasis on renewing its engagement with communities and localities; from greater use of restorative approaches; and form a clearer focus on the relational and reintegrative components of rehabilitation”. Robinson and Gaynor “The Future of Rehabilitation” in Priestley and Vanstone (Eds.) *Offenders or Citizens? Readings in Rehabilitation* (Willan, 2010) at 285. See also Priestly and Vanstone who sound a note of caution in this regard. Priestley and Vanstone *Offenders or Citizens? Readings in Rehabilitation* (Willan, 2010) at 213.

⁸⁴ See below this chapter. McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) at 102 citing Martinson “What works Questions and Answers about Prison Reform” (1974) *Public Interest* 22-54 and Brody *The Effectiveness of Sentencing* (London, 1976).

⁸⁵ *Ibid*.

⁸⁶ McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) at 103.

⁸⁷ *Ibid*.

⁸⁸ *Ibid* at 103-104.

1.34 In any event, in their much quoted article, Feeley and Simon argue that the “old penology” with its emphasis on the rehabilitation of individual offenders is being replaced with the “new penology”, otherwise described as actuarial justice, embracing forms of risk assessment aimed at the control of aggregate populations and including the expansion of the prison sector and the growing network of sanctions.⁸⁹

1.35 Reform and rehabilitation are rarely, if ever, advanced as justifications for mandatory sentencing provisions. On the contrary, they are often submitted as “exceptional and specific circumstances” justifying a sentence lower than the presumptive sentence prescribed by the *Misuse of Drugs Act 1977* and the *Firearms Acts*. Having said that, it should be considered whether rehabilitation should play any role in reaching conclusions on mandatory sentencing. On the one hand the view may be taken that a mandatory sentence structure could be ordered in such a way as to take account of the benefits of rehabilitation. On the other, it may be considered that the advantages of rehabilitation are not such as could distinguish mandatory sentences from sentences of imprisonment which are not mandatory in nature.

(4) Reparation

1.36 In its 2010 *Discussion Document on Criminal Sanctions*⁹⁰ the Department of Justice and Equality lists “reparation” as an aim of criminal sanctions and defines it by reference to “penalties [which] involve direct or indirect compensation for the harm caused to victims by crime”. Reparation thus asserts that people who have offended should do something to “repair” the wrong they have done and, in so doing, acknowledge the wrongness of their actions.⁹¹ This can take the form of compensating the victim of the offence or doing something else to assist the victim. If there is no individual or identifiable victim or, indeed, the victim is unwilling to accept it, reparation can be made to the community as a whole by performing community service or paying a fine into public funds. The concept of reparation is associated with the wide notion of “restorative justice”, which seeks to restore and repair relations between offenders, victims and the community as a whole. In this regard, the aim of reparation accords with the broader aim of the criminal justice system that unofficial retaliation be prevented.

1.37 It has been observed that a number of benefits may flow from reparation.⁹² Reparation - in so far as it aims to repair relations - may have a lot to contribute to policies aimed at the reintegration of offenders.⁹³ In addition, it has been asserted that if punishment is to be inflicted at all it is desirable that it should directly benefit the victim or society rather than merely hurt or restrict the offender.⁹⁴ Other commentators observe, however, that the concept is not free of difficulties. Where a sentencer discriminates between an offender who can afford to make reparation and an offender who cannot, particularly where the alternative is imprisonment, his or her policy may be regarded as inequitable.⁹⁵

1.38 In England, victims of personal violence, who fulfil certain eligibility criteria, are compensated by the Criminal Injuries Compensation Authority.⁹⁶ Otherwise, the sentencer is supposed to consider the victim’s case for compensation and, if the case is clear, order the offender to pay.⁹⁷ While this has proven

⁸⁹ Matthews “Rethinking Penal Policy: Towards a Systems Approach” in Matthews and Young *The New Politics of Crime and Punishment* (Willan, 2003) at 233, quoting Feeley and Simon “The New Penology: Notes on the Emerging Strategy of Corrections and its implications” (1992) *Criminology* 30(4) at 449-474.

⁹⁰ Department of Justice, Equality and Law Reform, *White Paper on Crime*, “Criminal Sanctions” Discussion Document No 2 (February, 2010).

⁹¹ Cavadino and Dignan *The Penal System - An Introduction* (Sage Publications, 3rd ed, 2002) at 44-45.

⁹² *Ibid* at 45.

⁹³ *Ibid*.

⁹⁴ *Ibid*.

⁹⁵ Walker and Padfield *Sentencing: Theory, Law and Practice* (Butterworths, 2nd ed, 1996) at paragraph 9.38.

⁹⁶ www.cica.gov.uk

⁹⁷ Walker and Padfield *Sentencing: Theory, Law and Practice* (Butterworths, 2nd ed, 1996) at paragraph 9.37.

to be a valuable corrective measure on some occasions, it has served only to create or increase the offender's grievance against the victim or the system on other occasions.⁹⁸ Furthermore, the situation often arises where an offender is either unable to pay the full compensation due or only able to pay it in small instalments. The victim in both situations receives less than he or she deserves.⁹⁹

1.39 While there is no Irish equivalent to the Criminal Injuries Assessment Authority, the concept of reparation is not alien to the Irish justice system. The Irish courts have the power to make community service orders and impose fines. The Commission acknowledges the role that reparation may play in the context of reintegration but cautions against the creation of an inequitable system where offenders with the financial means may escape imprisonment while offenders without the means may not.

1.40 Reparation is rarely, if ever, asserted as a justification for mandatory sentencing provisions. This may be due to the fact that criminal sanctions which pursue the purpose of reparation are usually an alternative to imprisonment. Thus reparation may not be of direct relevance to sentencing provisions which mandate prison sentences.

(5) Incapacitation

1.41 In its 2010 *Discussion Document on Criminal Sanctions*¹⁰⁰ the Department of Justice and Equality defines "incapacitation" as "to restrain the offender so as to limit their opportunities to commit further crime". Incapacitation may be a relevant consideration regarding both non-custodial and custodial sentences. Thus a traffic offence which merits disqualification from driving is as likely to hamper the future commission of traffic offences as a period of detention is likely to hamper the future commission of, for instance, burglaries. It is noted, however, that while some sentences serve incapacitative purposes more often than not any incapacitative effect is incidental rather than directed.

1.42 The Commission observes that incapacitation may be advanced as a general aim of sentencing but that it is usually aimed at particular groups such as dangerous offenders, career criminals or other persistent offenders.¹⁰¹ In this regard, custodial sentences, such as life imprisonment or lengthy terms of imprisonment, are often advocated as the best means of depriving offenders of the opportunities to engage in crime for the duration of their incarceration.¹⁰² Such custodial sentences are likely to have a greater impact on the rights of offenders and are, therefore, more controversial than non-custodial sentences serving incapacitative purposes. For this reason, the Commission proposes to focus mainly on the purpose of incapacitation in the context of custodial sentences.

1.43 There are a number of objections to the concept of incapacitation. First, it has been asserted that incapacitation runs counter to the principle of proportionality.¹⁰³ The principle of proportionality determines that a sentence should be based on the gravity of the offence and the personal circumstances of the offender rather than any prediction as to the risk of the offender re-offending if released.¹⁰⁴ Second, it has been observed that predictions of future behaviour are notoriously difficult to make.¹⁰⁵ Thus the principle of incapacitation - in so far as it relies on such predictions - may lead to unjust results. Third, it

⁹⁸ *Ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ Department of Justice, Equality and Law Reform, *White Paper on Crime*, "Criminal Sanctions" Discussion Document No 2 (February, 2010).

¹⁰¹ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 68.

¹⁰² O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-21; Cavadino and Dignan *The Penal System - An Introduction* (Sage Publications, 3rd ed 2002) at 38 ff.

¹⁰³ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-22; Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 69.

¹⁰⁴ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-22.

¹⁰⁵ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-23; Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 69; *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 4.46.

has been argued that the incapacitative effects of imprisonment are, at best, modest.¹⁰⁶ In this regard, it has been noted that most criminal careers are relatively short so that by the time offenders are incarcerated they may be about to renounce crime or reduce their offending anyway.

1.44 The Commission notes that there is also the constitutional objection that a person should not be deprived of his or her liberty on the basis of *anticipated* rather than *proven* offending.¹⁰⁷ In this regard, O'Malley asserts that the principle established in *People (Attorney General) v O'Callaghan*¹⁰⁸ - that a person should not be deprived of liberty on account of an apprehension that he or she will commit a further offence if released on bail - is based on the broader principles of the presumption of innocence and the right to personal liberty. Regarding the presumption of innocence, Ó Dálaigh C.J. stated:

"The reasoning underlying this submission is, in my opinion, a denial of the whole basis of our system of law. It transcends respect for the requirement that a man shall be considered innocent until he is found guilty and seeks to punish him in respect of offences neither completed nor attempted."¹⁰⁹

Regarding the right to liberty, Walsh J stated:

"[T]he likelihood of commission of further offences while on bail, is a matter which is in my view quite inadmissible. This is a form of preventative justice which has no place in our legal system and is quite alien to the true purposes of bail...

In this country, it would be quite contrary to the concept of personal liberty enshrined in the Constitution that any person should be punished in respect of any matter upon which he has not been convicted or that in any circumstances he should be deprived of his liberty upon only the belief that he will commit offences if left at liberty, save in the most extraordinary circumstances carefully spelled out by the Oireachtas and then only to secure the preservation of public peace and order or the public safety and the preservation of the State in a time of national emergency or in some situation akin to that."¹¹⁰

1.45 While the *O'Callaghan* principle has been reversed by constitutional amendment,¹¹¹ in so far as it relates to bail, it has been asserted that it may remain intact in relation to sentencing.¹¹² In support of this proposition, O'Malley refers to the decision of the Court of Criminal Appeal in *People (DPP) v Carmody*.¹¹³ In *Carmody*, the applicants were habitual criminals, the first applicant having convictions beginning in 1968 and the second applicant having convictions dating back to 1961. They had served numerous terms of imprisonment imposed by the District Court, primarily for periods of up to 12 months. In the instant case, they were charged with burglary and pleaded guilty to the charges in the Circuit Court. The trial judge, Murphy J, imposed a sentence of six years imprisonment on each applicant, stating that the applicants were:

¹⁰⁶ Cavadino and Dignan *The Penal System - An Introduction* (Sage Publications, 3rd ed, 2002) at 39.

¹⁰⁷ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-24.

¹⁰⁸ [1966] IR 501.

¹⁰⁹ *Ibid* at 508-509.

¹¹⁰ *Ibid* at 516-517.

¹¹¹ Article 40.4.6: "Provision may be made by law for the refusal of bail by a court to a person charged with a serious offence where it is reasonably considered necessary to prevent the commission of a serious offence by that person.

¹¹² O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-24; see *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 4.51.

¹¹³ [1988] IRLM 370.

“... not amenable in any manner to the ordinary constrictions of the society in which they live and they are preying on innocent people and my primary duty is to *protect* those people.”¹¹⁴
[*Emphasis added*].

The applicants applied for leave to appeal against sentence.

1.46 The Court of Criminal Appeal, *per* McCarthy J, observed that the only justification for the radical departure from the previous measures of imprisonment was an “understandable attempt to procure reform by prevention”. *In the absence of appropriate statutory provisions*, however, he considered that this was an unacceptable basis for the particular sentence and substituted a sentence of three years’ imprisonment in respect of each of the applicants.¹¹⁵ It is argued, therefore, that McCarthy J did not reject the possibility of preventative sentencing outright and that it might be permissible where appropriate statutory provisions were in place.

1.47 As noted above, however, incapacitation may run counter to the principle of proportionality and interfere with the right to personal liberty and the presumption of innocence. If O’Malley is correct in his argument, the Commission observes that legislation pursuing an incapacitative purpose might only be justified in circumstances which were - in the words of Walsh J in *People (DPP) v O’Callaghan* - “extraordinary”. Such circumstances might include the preservation of public peace and order; the public safety; or the preservation of the State in a time of national emergency.

1.48 While the Commission distinguished between incapacitation in the context of bail and incapacitation in the context of sentencing in its 1993 *Consultation Paper on Sentencing*,¹¹⁶ it took a different view to O’Malley in its 1995 *Report on Bail*.¹¹⁷ It observed that the judgment in *Carmody* was brief and did not clarify whether a statute could, in fact, render preventative sentencing valid or whether any such legislative provision would run into constitutional difficulty. It indicated that the more likely option was that the legislative provision would run into constitutional difficulty. It then referred to the case of *People (DPP) v Jackson*,¹¹⁸ in which the trial judge had imposed life sentences in respect of two rapes, saying that he did so to protect women against the accused until such time as in the judgment of the authorities the accused was fit to be released. On appeal to the Court of Criminal Appeal, Hederman J stated that preventative detention was not known to the Irish judicial system and reduced the sentences to 15 years and 18 years respectively.

1.49 The view that preventative detention is not known to the Irish judicial system has been supported by a number of recent decisions. In *People (DPP) v GK*,¹¹⁹ for instance, the Court of Criminal Appeal indicated that incapacitation might be justified to a limited extent by the need to deter offenders and protect society. In this regard, however, incapacitation should be “consistent with the proportionality principle and must not be conflated with a form of general preventive incarceration *which is not part of our jurisprudence*”. More recently, in *Whelan and Another v Minister for Justice, Equality and Law Reform*,¹²⁰ the Supreme Court concluded that a life sentence was a sentence of a wholly punitive nature and did not incorporate any element of preventative detention.

1.50 The Commission thus observes that the authorities lean against preventative detention in Ireland. This observation is of particular relevance to mandatory sentencing provisions which tend to target the most dangerous and persistent offenders. A common refrain in support of mandatory sentencing provisions has been the need to take and keep certain criminals off the streets. While such an argument may carry political weight, it would appear, in light of the foregoing analysis, to risk constitutional challenge.

¹¹⁴ *Ibid* at 370.

¹¹⁵ *Ibid* at 372.

¹¹⁶ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 4.51ff.

¹¹⁷ Law Reform Commission *Report on an Examination of the Law of Bail* (LRC 50-1995) at paragraph 1.46.

¹¹⁸ Court of Criminal Appeal 26 April 1993.

¹¹⁹ [2008] IECCA 110.

¹²⁰ [2010] IESC 34.

C Principles of Criminal Sanctions

1.51 There are many means by which the criminal justice system seeks to achieve its aims of displacing unofficial retaliation and reducing crime, including by education, social inclusion and policing. This Consultation Paper is not concerned with these aspects of the criminal justice system but rather with that aspect which relates to the imposition of criminal sanctions, in other words, sentencing. The Commission identifies a number of principles which constrain sentencing, namely, the humanitarian principle, the justice principle and the economic principle.¹²¹ These principles safeguard citizens against excessive behaviour by the State and shape the way in which the criminal justice system operates, specifically, the manner in which the aims of criminal sanctions are pursued. Along with the aims of criminal sanctions, the principles of criminal sanctions inform the Commission's analysis of mandatory sentences in Chapters 2, 3 and 4.

(1) Humanitarian Principle

1.52 The humanitarian principle provides that the criminal justice system should be such as to cause the minimum of suffering (whether to offenders or others) by its attempts to achieve its aims.¹²² The humanitarian principle, in its strongest form, prohibits the use of certain criminal sanctions, and, in its milder form, constrains the use of other sanctions. Each form will be considered in turn.

(a) Prohibition of Certain Criminal Sanctions

1.53 In its strongest form the humanitarian principle asserts that there are some criminal sanctions are so inhuman that they should not to be imposed even if they represent the minimum of suffering needed to reduce the incidence of a given type of offence.¹²³ As perceptions evolve over time, the humanitarian principle requires a "current evaluation as to what constitutes unacceptably inhumane punishment".¹²⁴ The result is that many types of criminal sanction - such as the death penalty, corporal punishment and gross humiliation - which would have been tolerated in former times, are now prohibited. By contrast, criminal sanctions - such as fines, community service orders and imprisonment - continue to be acceptable.

1.54 Accordingly, Article 15.5.2 of the Irish Constitution now provides that "[t]he Oireachtas shall not enact any law providing for the imposition of the death penalty",¹²⁵ while Article 28.3.3 provides that this prohibition may not be derogated from even in time of war or national emergency.¹²⁶ The inspiration for these provisions was Article 1 of the Sixth Protocol to the *European Convention on Human Rights* which provides for the abolition and prohibition of the death penalty. Article 2 of the Thirteenth Protocol prohibits any derogations from this provision while Article 3 prohibits any reservations.

1.55 Article 40.3.1 of the Irish Constitution contains the State's guarantee to respect, defend and vindicate the "personal rights" of the citizen, including the right to bodily integrity.¹²⁷ In *State (C) v Frawley*,¹²⁸ the High Court recognised that freedom from torture was a corollary of the right to bodily integrity. Finlay P thus stated:

¹²¹ McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) at 105-106.

¹²² Walker "The Aims of a Penal System" *The James Seth Memorial Lecture 1966* at 6.

¹²³ Walker "The Aims of a Penal System" *The James Seth Memorial Lecture 1966* at 6.

¹²⁴ McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) at 105.

¹²⁵ *Twenty-first Amendment of the Constitution Act 2001* [Prohibition of death penalty and removal of references to death penalty] 27 March 2002.

¹²⁶ Hogan and Whyte *JM Kelly: The Irish Constitution* (Lexis Nexis Butterworths, 4th ed, 2003) at paragraph 4.2.115. As will be observed in Chapter 2, the amendment of these articles was largely symbolic. There had not been an execution in Ireland since 1954, and the death penalty had been abolished for all but a very limited class of crimes by the *Criminal Justice Act 1964* and for all remaining crimes by the *Criminal Justice Act 1990*.

¹²⁷ *Ryan v Attorney General* [1965] IR 345.

¹²⁸ [1976] IR 365.

“If the unspecified personal rights guaranteed by Article 40 follow in part or in whole from the Christian and democratic nature of the State, it is surely beyond argument that they include freedom from torture, and from inhuman or degrading treatment and punishment.”¹²⁹

This is very similar to Article 3 of the European Convention on Human Rights which provides that “[n]o one shall be subjected to torture or to inhuman or degrading treatment or punishment”.¹³⁰

(b) Constraint on Use of Other Criminal Sanctions

1.56 In its milder form the humanitarian principle permits any measure that can be shown to be an effective deterrent or corrective, but insists that their severity should be kept to the necessary minimum.¹³¹ This is otherwise known as the principle of parsimony. Ashworth indicates that the principle of parsimony provides that all punishment is pain and should, therefore, be avoided or minimised where possible.¹³² By contrast, O’Flaherty states that the principle of parsimony provides that punishment should not impinge upon the personal rights of the offender beyond the amount necessary to exact retribution for the offence.¹³³ This explanation evokes Ireland’s obligations under the *European Convention on Human Rights*, which permits interference with specified human rights where the interference has been prescribed by law, pursues a legitimate aim and is *necessary* in a democratic society. The Commission observes that from these explanations a common thread may be discerned: punishment should only be imposed where it is necessary and it is the least invasive, sufficient option.

1.57 The principle of parsimony is commonly discussed in relation to custodial sanctions. Since custodial sanctions are the most severe and expensive criminal sanction available in Ireland, the theory is that they should be reserved for cases involving the most serious offences (“custody threshold”¹³⁴), where no other sanction would be appropriate in the circumstances (“last resort”¹³⁵).¹³⁶

1.58 While the principle of parsimony applies to sentencing in general, the Commission notes its particular relevance to mandatory sentencing. Mandatory sentencing provisions have the potential to impinge on the rights of the accused to a greater extent than discretionary sentencing provisions. Thus their use should be limited to situations in which they are, strictly speaking, necessary.

1.59 The so-called “custody threshold”¹³⁷ and the “last resort”¹³⁸ principle will now be considered in turn.

(i) Custody Threshold

1.60 While the concept of the “custody threshold” has received some attention in England and Wales,¹³⁹ it has received little in Ireland. At a very general level, it would appear to relate to the seriousness of the particular offence.

¹²⁹ *State (C) v Frawley* [1976] IR 365 at 374. Similar remarks were made in *Mulligan v Governor of Portlaoise Prison* [2010] IEHC 269; *W v Ireland* [1997] 2 IR 141; and *Murray v Ireland* [1985] IR 532.

¹³⁰ Similarly, Article 7 of the *International Covenant on Civil and Political Rights* provides that “[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.”

¹³¹ Walker “The Aims of a Penal System” *The James Seth Memorial Lecture 1966* at 6.

¹³² Ashworth *Sentencing and Criminal Justice* (Butterworths, 2000) at 83 quoting Bentham.

¹³³ O’Flaherty “Punishment and the Popular Mind: How much is Enough?” in O’Mahony (Ed) *Criminal Justice in Ireland* (Institute of Public Administration, 2002) at 381.

¹³⁴ Padfield “Time to Bury the Custody ‘Threshold’?” (2011) Crim L R 593.

¹³⁵ O’Malley “Comments on White Paper on Crime” [2010] 2 JSIJ 1 at 8.

¹³⁶ O’Malley *The Criminal Process* (Roundhall, 2009) at paragraph 22.05.

¹³⁷ Padfield “Time to Bury the Custody ‘Threshold’?” (2011) Crim L R 593.

¹³⁸ O’Malley “Comments on White Paper on Crime” [2010] 2 JSIJ 1 at 8.

¹³⁹ See discussion in Padfield “Time to Bury the Custody ‘Threshold’?” (2011) Crim L R 593.

1.61 Nevertheless, it has been asserted that the term “custody threshold” is unhelpful in so far as it gives a false sense of security by implying clarity where none exists.¹⁴⁰ There is no definite line between those offences which should attract a custodial sanction and those which should attract a non-custodial sanction. Indeed many offences straddle the so-called custody threshold such that they might equally, depending on the circumstances of the case, attract a custodial or a non-custodial sanction.¹⁴¹ There is little guidance, if any, as to how sentencers should deal with such “cusp” offences.

1.62 In addition, the custody threshold, in so far as it exists, is not static but varies between sentencers and over time.¹⁴² Sentencers may have different perspectives, which evolve over time, on a number of matters including: the extent to which an offence is sufficiently serious to cross the custody threshold; the weight to be attributed to various aggravating or mitigating factors; the significance of other factors such as previous convictions; and the appropriateness of various custodial and non-custodial sanctions.¹⁴³

1.63 Furthermore, the custody threshold may move. The custody threshold may move upwards - thus making it more difficult to imprison an offender - where a lack of prison spaces is coupled with the availability of a range of appropriate non-custodial alternatives. By contrast, the threshold may move downwards - thus making it easier to imprison an offender - where the availability of prison spaces is coupled with a lack of appropriate non-custodial alternatives.¹⁴⁴

(ii) Last Resort

1.64 That custody should be a sanction of last resort seems to reflect current penal philosophy.¹⁴⁵ In this regard, it may be noted that section 3 of the *Criminal Justice (Community Service) Act 1983*, as amended,¹⁴⁶ provides that where a sentencing court is of the opinion that the appropriate sentence would be one of imprisonment for a period of 12 months or less, it must consider making a community service order instead. In addition, section 2 of the *Courts (No 2) Act 1986*, as amended,¹⁴⁷ provides that a fine defaulter may only be imprisoned where he or she has not complied with a community service order.

1.65 The “last resort” principle has not, however, been defined in Ireland.¹⁴⁸ At a very general level, however, it would appear to relate to the sparing use of custody as a sanction for offences which meet the custody threshold. However, while some offences are so serious that custody is the only resort, there is a vast array of less serious offences for which a non-custodial sanction might be an appropriate option, in the first instance at least.

1.66 In addition, as with the custody threshold, the extent to which a custodial sanction may be considered the last resort may vary between sentencers and over time. Sentencers may have different views, evolving over time, regarding various matters including the seriousness of the offence; the significance of previous convictions; and the appropriateness of various non-custodial and custodial

¹⁴⁰ *Ibid.*

¹⁴¹ O'Malley “Comments on White Paper on Crime” [2010] 2 JSIJ 1 at 9; Padfield “Time to Bury the Custody ‘Threshold’?” (2011) Crim L R 593 at 600.

¹⁴² Padfield “Time to Bury the Custody ‘Threshold’?” (2011) Crim L R 593 at 610.

¹⁴³ *Ibid* at 603 and 606.

¹⁴⁴ It is not clear what would happen where there is a lack of both prison spaces and effective non-custodial alternatives. Arguably, the criminal justice system would err on the side of caution by keeping rates of imprisonment at a high level.

¹⁴⁵ See the *2011 Report of the Thornton Hall Project Review Group* at 73; *Making Punishments Work - Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001) at 21; and *Report of the Committee of Inquiry into the Penal System 1985* at paragraph 2.10.

¹⁴⁶ Section 3 of the *Criminal Justice (Community Service) (Amendment) Act 2011*.

¹⁴⁷ Section 19 of the *Fines Act 2010*.

¹⁴⁸ O'Malley “Comments on White Paper on Crime” [2010] 2 JSIJ 1 at 8.

sanctions. Furthermore, the extent to which a custodial sanction may be considered the last resort may vary depending on the availability of non-custodial alternatives.

(2) Justice Principle

1.67 The justice principle relates to constraints on the manner in which criminal sanctions may be imposed.¹⁴⁹ Legality, proportionality, consistency and transparency are subsets of this principle. Each will now be considered in turn.

(a) Legality Principle

1.68 The legality principle requires that sentencing decisions be made in accordance with the law, declared in advance.¹⁵⁰ A prerequisite to this is that sentencing law, no less than criminal law, should be clear, predictable and certain. The reason for this is that individuals should be on notice not only of the fact that they will be subject to *some* criminal sanction if they transgress the law,¹⁵¹ but also of the *nature and degree* of that criminal sanction. (As noted at paragraph 1.26, the level of knowledge that individuals have regarding the nature and degree of a criminal sanction may also influence the extent to which that criminal sanction may be said to have a deterrent effect). The Commission observes, however, that sentencing law, in its current state, cannot be described as clear, predictable or certain.

(b) Proportionality

1.69 Ashworth asserts that proportionality is one of the main contributions of the “just desert” theory.¹⁵² In this regard, he argues that proportionality may be understood in two senses - ordinal proportionality and cardinal proportionality.¹⁵³ Ordinal proportionality concerns the relative seriousness of offences among themselves, while cardinal proportionality relates the ordinal ranking of offences to a scale of punishments.¹⁵⁴

1.70 In *Whelan and Another v Minister for Justice, Equality and Law Reform*¹⁵⁵ the High Court (Irvine J), distinguished between constitutional proportionality and proportionality in the context of sentencing. On appeal, this distinction was upheld by the Supreme Court.¹⁵⁶ Referring to the judgment of Costello J in *Heaney v Ireland*,¹⁵⁷ Murray CJ observed that the constitutional doctrine of proportionality:

“...is a public law doctrine with specified criteria, according to which decisions or acts of the State, and in particular legislation, which encroach on the exercise of constitutional rights which citizens are otherwise entitled freely to enjoy, are scrutinised with regard to their compatibility with the Constitution or the law.”

By contrast, “proportionality” in the context of sentencing is a term which is descriptive of the manner in which judicial discretion should, as a matter of principle, be exercised within particular proceedings.

¹⁴⁹ McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) at 106.

¹⁵⁰ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 3-01; Duff “Guidelines as Guidelines” (2005) 105 Colum L Rev 1162 at 1163-1166; and McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) at 42ff. Ashworth states that the legality principle requires that “judicial decisions be taken *openly* and *by reference to standards declared in advance*”. Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 62. The Commission will consider transparency in a separate section.

¹⁵¹ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 3-01; and Duff “Guidelines as Guidelines” (2005) 105 Colum L Rev 1162 at 1163-1166.

¹⁵² Ashworth *Sentencing and Criminal Justice* (Butterworths, 2000) at 72.

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ [2007] IEHC 374.

¹⁵⁶ [2010] IESC 34.

¹⁵⁷ [1994] 3 IR 593.

(i) Constitutional Proportionality

1.71 Thus constitutional proportionality is applicable to acts of the Oireachtas. In the High Court decision *Heaney v Ireland*, Costello J pronounced the test for constitutional proportionality as follows:

“The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:-

- (a) Be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
- (b) Impair the right as little as possible, and
- (c) Be such that their effects on rights are proportional to the objective...”¹⁵⁸

1.72 The Supreme Court adopted a similar test in *In re the Employment Equality Bill 1996*:¹⁵⁹

“In effect a form of proportionality test must be applied to the proposed section. (a) Is it rationally designed to meet the objective of the legislation? (b) Does it intrude into constitutional rights as little as is reasonably possible? (c) Is there a proportionality between the section and the right to trial in due course of law and the objective of the legislation?”¹⁶⁰

1.73 *Heaney* and *In re the Employment Equality Bill 1996* were preceded by the Supreme Court decision in *Cox v Ireland*¹⁶¹, which has been identified as an important landmark in modern judicial thinking on mandatory sentences.¹⁶² The plaintiff challenged section 34 of the *Offences Against the State Act 1939*, which provided that any person convicted by the Special Criminal Court of a scheduled offence would forfeit any office or employment remunerated from public funds and be disqualified from holding any such office or employment for a period of 7 years from the date of conviction. The plaintiff, a teacher at a community school, was convicted by the Special Criminal Court of a scheduled offence. As a result, he lost his post, pension and pay-related social insurance rights, and became ineligible to work in a similar post for a period of 7 years.

1.74 Both the High Court and the Supreme Court found section 34 to be unconstitutional. The High Court (Barr J) held that the penalties imposed by section 34 were patently unfair and capricious in nature and that they amounted to an unreasonable and unjustified interference with the plaintiff’s personal rights. The Supreme Court observed that the State was entitled to impose onerous and far-reaching penalties for offences threatening the peace and security of the State but that it must, as far as practicable, protect the constitutional rights of the citizen. It found that the State had failed in this regard as the provisions of section 34 were “impermissibly wide and indiscriminate”. The mandatory penalties contained in section 34 applied to all scheduled offences which included less serious offences and offences of the utmost gravity. Furthermore, there was no way to escape the mandatory penalties even if a person could show that his or her intention or motive in committing the offence bore no relation to considerations of the peace and security of the State.

1.75 More recently, in *Whelan and Another v Minister for Justice, Equality and Law Reform*¹⁶³ the Supreme Court applied the proportionality test to section 2 of the *Criminal Justice Act 1990*, which imposes a mandatory life sentence for murder. Confirming that the Oireachtas was empowered to enact legislation setting mandatory penalties, Murray CJ observed that such legislation might be unconstitutional if “there was no rational relationship between the penalty and the requirements of justice with regard to the punishment of the offence specified”.

¹⁵⁸ [1994] 3 IR 593, 607.

¹⁵⁹ [1997] 2 IR 321.

¹⁶⁰ *In re the Employment Equality Bill 1996* [1997] 2 IR 321, 383.

¹⁶¹ [1992] 2 IR 503.

¹⁶² O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 28-04.

¹⁶³ [2010] IESC 34.

The decision in *Cox* may be contrasted with the decision in *Whelan and Another*. In *Cox*, the Supreme Court found that the mandatory provision concerned was impermissibly wide and indiscriminate in so far as it applied to all scheduled offences without distinction as to their gravity. In *Whelan and Another*, however, the Supreme Court rejected the appellants' argument that the mandatory provision concerned was unconstitutional in so far as it prevented the judge from exercising his or her discretion to treat differently different types of murder case. The unique nature of murder was found to justify treating all cases of murder, irrespective of the degree of moral blameworthiness, the same.

1.76 As mandatory sentencing provisions have the potential to infringe on the rights of the accused to a greater extent than discretionary sentencing provisions, the Commission believes that the doctrine of constitutional proportionality should be stringently applied to all mandatory sentencing provisions with the possible exception of that provision relating to murder. The doctrine of constitutional proportionality thus requires that, first, the mandatory sentencing provision should be rationally connected to the objective it seeks to achieve and should not be arbitrary, unfair or based on irrational considerations. Second, the mandatory provision should impair the rights of the accused as little as possible. Third, there should be proportionality between the mandatory provision and the right to trial in due course of law and the objective of the legislation.

(ii) Sentencing Proportionality

1.77 Proportionality in the context of sentencing is a different species entirely. In this sense, proportionality requires that a sentence be proportionate to the gravity of the offence and - as is generally accepted - the circumstances of the offender.¹⁶⁴ The Irish courts have reaffirmed this aspect of proportionality on numerous occasions.

1.78 In *People (Attorney General) v O'Driscoll*,¹⁶⁵ for instance, Walsh J stated:

"It is... the duty of the Courts to pass what are the appropriate sentences in each case having regard to the particular circumstances of that case – not only in regard to the particular crime but in regard to the particular criminal."¹⁶⁶

1.79 Similarly, in *People (DPP) v Tiernan*¹⁶⁷ the Supreme Court was asked to consider a point of law of exceptional public importance,¹⁶⁸ namely, the guidelines applicable to sentences for the crime of rape. While the Supreme Court refrained from formulating any such guidelines, Finlay CJ observed that "in every criminal case a judge must impose a sentence which in his opinion meets the particular circumstances of the case and of the accused person before him."¹⁶⁹

1.80 Likewise, in *People (DPP) v M*¹⁷⁰ the Supreme Court considered the severity of sentences imposed for a number of counts of buggery, indecent assault and sexual assault. During the course of its consideration, Denham J indicated that sentences should be proportionate in two respects:

"Firstly, they should be proportionate to the crime. Thus, a grave offence is reflected by a severe sentence...

However, sentences must also be proportionate to the personal circumstances of the appellant. The essence of the discretionary nature of sentencing is that the personal situation of the appellant must be taken into consideration by the court."¹⁷¹

¹⁶⁴ O'Malley *The Criminal Process* (Roundhall, 2009) at paragraph 22.02.

¹⁶⁵ (1972) 1 Frewen 351.

¹⁶⁶ *Ibid* at 359.

¹⁶⁷ [1988] IR 251.

¹⁶⁸ Section 29 of the *Courts of Justice Act 1924*.

¹⁶⁹ *People (DPP) v Tiernan* [1988] IR 251, 253.

¹⁷⁰ [1994] 3 IR 306.

¹⁷¹ *People (DPP) v M* [1994] 3 IR 306, 316.

1.81 There are numerous examples of this principle being applied by the Irish courts.¹⁷²

1.82 For the purpose of formulating proportionate sentences, the courts have adopted a two-tiered approach by which they, first, locate where on the range of applicable penalties a particular case should lie, and, then, consider the factors which aggravate and mitigate the sentence.¹⁷³

1.83 Thus, in the Supreme Court decision in *People (DPP) v M*¹⁷⁴ Egan J stated:

“It must be remembered also that a reduction in mitigation is not always to be calculated in direct regard to the maximum sentence applicable. One should look first at the range of penalties applicable to the offence and then decide whereabouts on the range the particular case should lie. The mitigating circumstances should then be looked at and an appropriate reduction made.”¹⁷⁵

Given that Egan J was considering the following factors - (i) the appellant’s guilty plea, (ii) the likelihood of him reoffending, (iii) the appellant’s age and (iv) the possibility of rehabilitation - it is clear that “mitigating circumstances”, in this regard, is a reference to circumstances which would mitigate a sentence rather than the seriousness of an offence.¹⁷⁶

1.84 The Commission notes, however, that it may be slightly misleading to describe Egan J’s approach to formulating a proportionate sentence as a “two-tiered” approach when, in fact, it involves three inter-related steps:¹⁷⁷

- (i) Identifying the range of applicable penalties;
- (ii) Locating the particular case on that range; and
- (iii) Applying any factors which mitigate or aggravate the sentence.

Each of these steps will be considered in turn.

(I) *Identifying the Range of Applicable Penalties:*

1.85 To determine the range of penalties applicable to the particular offence, the courts will consider whether the Oireachtas has provided any guidance by means of, for instance, a statutory maximum or minimum sentence.¹⁷⁸ Thus, for example, section 14 of the *Criminal Justice (Theft and Fraud Offences) Act 2001* provides that robbery is subject to a maximum penalty of life imprisonment. As a result, a person convicted of robbery may expect to receive a sentence ranging from 0 years to life imprisonment, depending on the circumstances of the case and the offender. The fact that robbery is subject to a maximum sentence of life imprisonment also indicates how serious robbery should be considered, as does the direction that an accused charged with robbery should be tried on indictment.¹⁷⁹ It is thus fair to

¹⁷² *People (DPP) v WC* [1994] 1 ILRM 321; *People (DPP) v Sheedy* [2000] 2 IR 184; *People (DPP) v Kelly* [2005] 1 ILRM 19; *People (DPP) v O’Dwyer* [2005] 3 IR 134; *Pudlizewski v District Judge John Coughlan and the DPP* [2006] IEHC 304; *People (DPP) v H* [2007] IEHC 335; *People (DPP) v GK* [2008] IECCA 110; *People (DPP) v Keane* [2008] 3 IR 177; *People (DPP) v Harty* Court of Criminal Appeal 19 February 2008; *People (DPP) v O’C* Court of Criminal Appeal 5 November 2009; *People (DPP) v Woods* Court of Criminal Appeal 10 December 2010.

¹⁷³ O’Malley *Sentencing Law and Practice* (Round Hall Thompson, 2nd ed, 2006) at paragraph 5-12ff.

¹⁷⁴ [1994] 3 IR 306.

¹⁷⁵ *Ibid* at 315.

¹⁷⁶ See Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraphs 3.5-3.8.

¹⁷⁷ *People (DPP) v Crowe* [2010] 1 IR 129.

¹⁷⁸ *People (DPP) v Maguire* Court of Criminal Appeal 19 February 2008; *People (DPP) v O’C* Court of Criminal Appeal 5 November 2009; *People (DPP) v Halligan* Court of Criminal Appeal 15 February 2010.

¹⁷⁹ *People (DPP) v Loving* [2006] IECCA 28.

assume that robbery, which is “liable on conviction on indictment to imprisonment for life”,¹⁸⁰ is a serious offence.

1.86 For some serious offences, excluding those to which mandatory and mandatory minimum sentences apply, the courts have established points of departure regarding the sentence to be imposed. Thus, in the Supreme Court decision in *People (DPP) v Tiernan*¹⁸¹ Finlay CJ made the following remark regarding the sentence for rape:

“Whilst in every criminal case a judge must impose a sentence which in his opinion meets the particular circumstances of the case and of the accused person before him, it is not easy to imagine the circumstances which would justify departure from a *substantial immediate custodial* sentence for rape and I can only express the view that they would probably be *wholly exceptional*.”¹⁸² [Emphasis added]

Thus a person convicted of rape should ordinarily expect to receive a substantial custodial sentence save where it is shown that there are “wholly exceptional” circumstances.

1.87 Similarly, in the Court of Criminal Appeal decision in *People (DPP) v Princs*¹⁸³ regarding the sentence for manslaughter the Court observed:

“[T]he offence of manslaughter, particularly voluntary manslaughter where an unlawful act of violence is involved, should normally involve a *substantial term of imprisonment* because a person has been killed. Only where there are special circumstances and context will a moderate sentence or in wholly exceptional circumstances, a non-custodial sentence, be warranted. Those circumstances are more likely to arise in cases [of] involuntary manslaughter...” [Emphasis added]

Thus a person convicted of manslaughter should ordinarily expect to receive a substantial custodial sentence save where “special circumstances” would justify a moderate sentence or “wholly exceptional circumstances” would justify a non-custodial sentence.

1.88 In general, however, the courts should not, however, constrain their discretion in sentencing by following a fixed policy where none has been prescribed by law. In *People (DPP) v WC*¹⁸⁴ the Central Criminal Court indicated that:

“It is not open to a judge in a criminal case when imposing sentence, whether for a particular type of offence, or in respect of a particular class of offender, to fetter the exercise of his judicial discretion through the operation of a fixed policy, or to otherwise pre-determine the issue.”¹⁸⁵

1.89 Thus in *People (DPP) v Kelly*,¹⁸⁶ where the trial judge had indicated that on the basis of a policy of deterrence he would impose a sentence of 20 years in cases involving death and serious injury caused by the use of knives, the Court of Criminal Appeal found that he had erred in principle.¹⁸⁷

1.90 In some cases, the courts have gone further by setting out the ranges of penalties applicable to various combinations of facts. In *People (DPP) v WD*,¹⁸⁸ for instance, the Central Criminal Court

¹⁸⁰ Section 14 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

¹⁸¹ [1988] IR 251.

¹⁸² *People (DPP) v Tiernan* [1988] IR 251, 253.

¹⁸³ [2007] IECCA 142.

¹⁸⁴ [1994] 1 ILRM 321.

¹⁸⁵ *Ibid* at 325.

¹⁸⁶ [2005] 1 ILRM 18.

¹⁸⁷ *People (DPP) v Kelly* [2005] 1 ILRM 18, 22. See also *People (DPP) v Dillon* Court of Criminal Appeal 17 December 2003; *Pudliszewski v District Judge Coughlan and DPP* [2006] IEHC 304; and *Dunne v Judge Coughlan* High Court 25 April 2005.

¹⁸⁸ [2008] 1 IR 308.

considered cases of rape over a three-year period in which lenient, ordinary, severe and condign punishments had been imposed.¹⁸⁹

1.91 In the category of lenient punishments, the Court considered cases in which a suspended sentence had been imposed.¹⁹⁰ It noted that a suspended sentence could only be contemplated where the circumstances of the case were “so completely exceptional as to allow the court to approach sentencing for an offence of rape in a way that deviates so completely from the norm established by law.”¹⁹¹

1.92 In the category of ordinary punishments, the Court considered cases in which a sentence range of three to 8 years had been applied.¹⁹² It noted that a sentence at the upper end of the scale, a sentence of 8 years or more, for which the courts took into account aggravating factors, could be imposed even on a plea of guilty. An offender could expect a sentence at the upper end of the scale where there had been “a worse than usual effect on the victim, where particular violence has been used or where there are relevant previous convictions, such as convictions for violence of some kind.”¹⁹³ An offender could expect a sentence of five years where he or she had pled “guilty to rape in circumstances which involve no additional gratuitous humiliation or violence beyond those ordinarily involved in the offence,”¹⁹⁴ whereas he or she could expect a sentence of 6 or 7 years where there was no early admission, remorse or early guilty plea.¹⁹⁵

1.93 In the category of severe punishments, the Court considered cases in which a sentence range of 9 to 14 years had been applied.¹⁹⁶ The Court observed that five of the cases involved individual offences of a single count of rape; 9 involved a single attack that generated more than one conviction; and four involved multiple counts.¹⁹⁷ It noted that previous convictions for a sexual offence were an aggravating factor which would normally result in the imposition of a severe sentence.¹⁹⁸ A sentence of 10 or 11 years was unusual, even after a plea of not guilty, unless there were circumstances of unusual violence or premeditation.¹⁹⁹ A sentence range of 9 to 14 years was more likely where the degree to which the offender chose to violate and humiliate the victim warranted it.²⁰⁰

1.94 In the category of condign punishments, the Court considered cases in which a sentence range of 15 years to life imprisonment had been imposed.²⁰¹ The Court observed that 9 involved a single incident that lasted for a considerable number of hours; two involved gang rape; and 11 involved multiple incidents or multiple victims or both.²⁰² It noted that factors such as the nature of the victim, being very young or very old, the effect of the attack and the especial nature of the violence or degradation were characteristic of sentences within this most serious category.²⁰³ A life sentence had been imposed where

¹⁸⁹ *Ibid* at 330.

¹⁹⁰ *Ibid* at 319.

¹⁹¹ *Ibid* at 319.

¹⁹² *Ibid* at 324.

¹⁹³ *Ibid* at 324.

¹⁹⁴ *Ibid* at 324.

¹⁹⁵ *People (DPP) v WD* [2008] 1 IR 308, 324.

¹⁹⁶ *People (DPP) v WD* [2008] 1 IR 308, 327.

¹⁹⁷ *People (DPP) v WD* [2008] 1 IR 308, 324.

¹⁹⁸ *Ibid* at 326.

¹⁹⁹ *Ibid* at 326.

²⁰⁰ *Ibid* at 327.

²⁰¹ *Ibid* at 319.

²⁰² *Ibid* at 327.

²⁰³ *Ibid* at 328.

there had been a need to protect the community, where very serious, vicious and degrading sexual crimes had been committed against a victim over a period of years.²⁰⁴ The abuse of trust²⁰⁵ and the pursuit of a campaign of rape, for instance, against prostitutes²⁰⁶ were also seen as aggravating factors.

1.95 Similarly, in *People (DPP) v H*²⁰⁷ the Court of Criminal Appeal considered the more significant cases in which lenient, ordinary and serious sentences had been imposed for sexual offences which had been committed between 10 and 40 years before prosecution.

1.96 In *People (DPP) v Pakur Pakurian*²⁰⁸ the Court of Criminal Appeal considered the range of punishments that might apply to robbery:

“...[I]n a very well planned commercial robbery one might be looking at eighteen years for the most culpable people, or twelve years for those less culpable, and one might also find that there are cases where because of the particular circumstances such as a mugging which was caused by heroin addiction which has been cured or where the person has entered rehabilitation, or matters of those nature, that the sentence might be significantly less than the seven years sentence, even perhaps a suspended sentence. But in between one finds a range of sentences and the Court is sure there are even ones of more than eighteen years, but a range of sentences which are appropriate.”²⁰⁹

Thus, depending on the presence of various factors, a person convicted of robbery might expect to receive a sentence in one of the ranges outlined above up to the statutory maximum sentence of life imprisonment.²¹⁰

1.97 Bearing in mind the humanitarian principle, in particular, the custody threshold and the last resort principle, and the other aspects of the legality principle, the Commission is of the view that it is appropriate that certain offences at the high end of the scale of gravity should attract an immediate, substantial custodial sentence, save in exceptional circumstances.

(II) *Locating the Particular Case on the Range of Applicable Penalties:*

1.98 Having identified the range of applicable penalties, the courts must then locate the particular case on that range. In order to do this the courts must first determine the seriousness or gravity of the particular case. In *People (DPP) v GK*²¹¹ the Court of Criminal Appeal attempted to identify the factors that must be considered in order to assess the gravity of a particular case:

“Having regard to the jurisprudence of this Court and of the Supreme Court the matters which determine the gravity of a particular offence are the *culpability of the offender*, the *harm caused* and the *behaviour of the offender* in relation to the particular offence.”²¹² [Emphasis added]

²⁰⁴ *Ibid* at 329.

²⁰⁵ *Ibid* at 330.

²⁰⁶ *People (DPP) v WD* [2008] 1 IR 308, 330.

²⁰⁷ [2007] IEHC 335.

²⁰⁸ Court of Criminal Appeal 10 May 2010.

²⁰⁹ *People (DPP) v Pakur Pakurian* Court of Criminal Appeal 10 May 2010.

²¹⁰ Section 14 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

²¹¹ [2008] IECCA 110.

²¹² *People (DPP) v GK* [2008] IECCA 110. See the Court of Criminal Appeal decision in *People (DPP) v Keane* [2008] 3 IR 177, 195, which concerned the sentence for rape, in which Murray CJ indicated that: “The law obliges [the sentencing judge] to have regard to all the salient features of the circumstances in which the offence was committed, the nature of the offence and its *impact on the victim and society* so as to evaluate its gravity. The sentencing judge is also obliged to have regard to the particular individual who must be sentenced, his or her personal history and circumstances so that a punishment which is proportionate and just may be imposed.” (emphasis added)

It is interesting to note that these three indicia - namely, (i) culpability of the offender, (ii) harm caused and (iii) behaviour of the offender - had previously been highlighted by O'Malley, who cited the *2004 Guideline of the Sentencing Guidelines Council of England and Wales on Seriousness* and the decision of the English Court of Appeal in *R v Howells*²¹³ in his research.²¹⁴ It is also interesting to note the extent to which these indicia draw attention to the individual circumstances of the case and the offender.

1.99 Regarding *culpability*, O'Malley asserts that it is useful to have regard to the nature of the mental element or *mens rea* which the offender is found, or appears, to have had when committing the offence.²¹⁵ He thus observes:

"Intention to cause harm clearly represents the highest level of culpability and the more harm intended, the greater the blameworthiness. Recklessness, in the sense of a conscious disregard of an unjustifiable risk, comes next, and again the greater and more dangerous the risk, the greater the culpability. Negligence would rank as the lowest form of culpability, which is not to say that it should be met with impunity if it has produced serious harm."²¹⁶

Thus on a scale of culpability, intention ranks highest, negligence ranks lowest and recklessness ranks somewhere in between.

1.100 In *People (DPP) v O'Dwyer*,²¹⁷ for example, a case concerning careless driving, the Court of Criminal Appeal made the following observation regarding culpability:

"The concept of careless driving covers a wide spectrum of culpability ranging from the less serious to the more serious. It covers a mere momentary inattention, a more obvious carelessness, a more positive carelessness, bad cases of very careless driving falling below the standard of the reasonably competent driver and cases of repeat offending. However, since even a mere momentary inattention in the driving of a mechanically propelled vehicle can give rise to a wholly unexpected death, the court has always to define the degree of carelessness and therefore culpability of the driving."²¹⁸

Thus for any given offence the sentencing court must look at the particular circumstances of the case (and the offender) to determine the level of culpability.

1.101 In the same case, the Court considered whether the fact that a death had occurred as a result of the careless driving could be considered an aggravating factor. In this regard, it distinguished between cases in which death had been an unfortunate consequence and cases in which there had been a high risk of death:

"[T]here is a world of difference between a mere momentary inattention in the driving of a mechanical (*sic*) propelled vehicle, which unexpectedly and tragically causes a loss of a life, and grossly careless driving, which, though still short of dangerous driving, hardly surprisingly results in a fatal collision. A rigid adherence in sentencing to an approach which excludes any reference to the death in itself as an aggravating factor, despite the many and various differences in the degrees of careless driving, would not be proportionate.

While the fact of death occurring may be a separate factor in itself, it should not be so in every case where there is a death. The occasions on which it becomes a factor must depend upon the

²¹³ [1999] 1 WLR 307; see O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 5-16.

²¹⁴ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 5-16.

²¹⁵ *Ibid* at paragraph 5-15.

²¹⁶ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 5-15.

²¹⁷ [2005] 3 IR 134.

²¹⁸ *People (DPP) v O'Dwyer* [2005] 3 IR 134, 148.

finding of the court on the primary issue of the degree of carelessness and therefore of the culpability of driving.”²¹⁹

In the particular circumstances of the case, where the primary issue of carelessness revolved around the fact that the applicant had driven with bald tyres, the Court found that it would be disproportionate to regard the death as an aggravating factor in itself.

1.102 Regarding *harm*, O’Malley asserts that the greater the harm caused the more serious the offence is likely to be considered.²²⁰ Arguably, as illustrated by *People (DPP) v O’Dwyer*²²¹, the level of harm *risked* should also be a relevant factor.²²² O’Malley observes that difficulties may arise where it appears that the offence had more serious consequences than the offender intended, but that consequences that were reasonably foreseeable and that actually occurred should be taken into account when assessing harm.²²³

1.103 Thus in *People (DPP) v WD*²²⁴ the Central Criminal Court referred to the effect of the rape on the victim, which was “somewhat worse than is usual”, in concluding that a sentence at the upper end of the normal range would be appropriate:²²⁵

“[T]he victim impact statement indicates that the victim had difficulty sleeping at first and suffered panic attacks. Her concentration went as to her studies and she began to panic about all matters. She lost interest in study and almost dropped out and left her part time job. She suffered a big character change from being outgoing into being closed with family and friends. Now she is uncomfortable in the presence of men and wary while out particularly at night and looking over her shoulder.”²²⁶

1.104 In *People (DPP) v GK*²²⁷ the Court of Criminal Appeal referred to the “serious harm” done to the victim in concluding that the particular aggravated sexual assault lay in “the mid to upper range of seriousness on the scale of gravity of such assaults”:

“Though the victim did not receive any psychological or psychiatric treatment, it is clear from the Victim Impact Statement that the effect of this sexual assault on her was very grave. She was unable to work for four weeks. The cost of treatment to her damaged teeth is €2,900. Her enjoyment of life has been permanently impaired in that her sense of security in society has been lost and she has become overcautious in moving about during daylight hours and is afraid to go out at night unaccompanied. This is a very great imposition in the case of a single lady of twenty five years of age.”

1.105 Regarding *offender behaviour*, O’Malley indicates that an offence will be considered more serious where there are aggravating factors arising from the offender’s behaviour when committing the offence.²²⁸ These include the use of a weapon (and the more dangerous the weapon, the more serious

²¹⁹ *People (DPP) v O’Dwyer* [2005] 3 IR 134, 152.

²²⁰ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 5-15.

²²¹ [2005] 3 IR 134.

²²² See the *2004 Sentencing Guideline of the Sentencing Guidelines Council of England and Wales on Seriousness*.

²²³ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 5-15.

²²⁴ [2008] 1 IR 308.

²²⁵ *Ibid* at 334.

²²⁶ *People (DPP) v WD* [2008] 1 IR 308, 334.

²²⁷ [2008] IECCA 110.

²²⁸ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 5-15. See *People (DPP) v WD* [2008] 1 IR 308 in general.

the factor),²²⁹ the deliberate procurement of a weapon to commit the offence,²³⁰ the targeting of vulnerable victims,²³¹ intrusion into a victim's home,²³² premeditation and planning,²³³ participation in a criminal gang,²³⁴ abuse of trust or power,²³⁵ infliction of deliberate and gratuitous violence or degradation over and above that needed to commit the offence,²³⁶ commission of the offence for profit or other personal gain, or evidence of hostility towards the victim on racial, religious or other grounds.

1.106 Thus, for example, in *People (DPP) v Tiernan*,²³⁷ a case concerning the sentence for rape, the Supreme Court identified the following aggravating factors:

- “(1) It was a gang rape, having been carried out by three men.
- (2) The victim was raped on more than one occasion.
- (3) The rape was accompanied by acts of sexual perversion.
- (4) Violence was used on the victim in addition to the sexual acts committed against her.
- (5) The rape was performed by an act of abduction in that the victim was forcibly removed from a car where she was in company with her boyfriend, and her boyfriend was imprisoned by being forcibly detained in the boot of the car so as to prevent him assisting her in defending herself.
- (6) It was established that as a consequence of the physical trauma involved in the rape the victim suffered from a serious nervous disorder which lasted for at least six months and rendered her for that period unfit to work.
- (7) The appellant had four previous convictions, being:-
 - (a) for assault occasioning actual bodily harm,
 - (b) for aggravated burglary associated with a wounding,
 - (c) for gross indecency, and
 - (d) for burglary.

Of this criminal record, particularly relevant as an aggravating circumstance to a conviction for rape are the crimes involving violence and the crime involving indecency.”²³⁸

In light of these factors, the Supreme Court concluded that this was a particularly serious case of rape.

1.107 This approach was applied by the Court of Criminal Appeal in *People (DPP) v Roseberry Construction Ltd and McIntyre*,²³⁹ in which the first defendant was a building company and the second defendant was its managing director. The defendants pleaded guilty to charges under the *Safety, Health*

²²⁹ *People (DPP) v Black* [2010] IECCA 91; *People (DPP) v Kelly* [2005] 1 ILRM 19; *People (DPP) v Princs* [2007] IECCA 142; *People (DPP) v Maguire* Court of Criminal Appeal 19 February 2008; *People (DPP) v Dillon* Court of Criminal Appeal 17 December 2003.

²³⁰ *People (DPP) v Black* [2010] IECCA 91; *People (DPP) v Kelly* [2005] 1 ILRM 19; *People (DPP) v Princs* [2007] IECCA 142; *People (DPP) v Maguire* Court of Criminal Appeal 19 February 2008.

²³¹ *People (DPP) v GK* [2008] IECCA 110; *People (DPP) v Keane* [2008] 3 IR 177; *People (DPP) v WD* [2008] 1 IR 308.

²³² *People (DPP) v Keane* [2008] 3 IR 177.

²³³ *People (DPP) v GK* [2008] IECCA 110; *People (DPP) v Maguire* Court of Criminal Appeal 19 February 2008.

²³⁴ *People (DPP) v Tiernan* [1988] IR 250; *People (DPP) v Maguire* Court of Criminal Appeal 19 February 2008.

²³⁵ *People (DPP) v M* [1994] 3 IR 306.

²³⁶ *People (DPP) v Tiernan* [1988] IR 250; *People (DPP) v WD* [2008] 1 IR 308.

²³⁷ [1988] IR 250.

²³⁸ *People (DPP) v Tiernan* [1988] IR 250, 253-254.

²³⁹ [2003] 4 IR 338.

*and Welfare at Work Act 1989*²⁴⁰ related to the death of two persons on the building site for which the company had overall responsibility as main contractor. The defendant company was fined €254,000 (£200,000) for failure to have a safety statement under section 12 of the 1989 Act (now section 20 of the 2005 Act) and the managing director was fined €50,800 (£40,000) for managerial neglect under section 48(19) of the 1989 Act (now section 80 of the 2005 Act).

1.108 The company appealed against the severity of the fines imposed on it, but the Court of Criminal Appeal dismissed the appeal. The Court applied the general sentencing principle set out in *People (DPP) v Redmond*²⁴¹ that a fine is neither lenient, nor harsh, in itself but only in terms of the circumstances of the person who must pay it. In this case, the Court noted that the somewhat unusual approach had been taken of stating that the company could pay the fine – it was not going to drive it out of business or anything of that sort, although without giving any indication of the level of business which the company conducted. The information which the Court had was the same as the trial judge, namely that it was a medium to large company and that at the time of the fatality it was conducting the building of 90 houses at the building site. The Court concluded that the company “was a substantial, relatively complex and profitable enterprise.”

1.109 The Court of Criminal Appeal then went on to consider the detailed principles it should apply. It approved of the list of aggravating and mitigating factors set out by the English Court of Appeal in *R v F Howe & Son (Engineers) Ltd*²⁴² to be taken into account in the level of fines to be imposed in prosecutions under the equivalent British *Health and Safety at Work Act 1974*.

1.110 The aggravating factors included:

- death resulting from a breach of the Act or Regulations,
- failure to heed warnings and
- risks run specifically to save money.²⁴³

1.111 The mitigating factors included:

- prompt admission of responsibility and a timely plea of guilty,
- steps to remedy the deficiencies and
- a good safety record.²⁴⁴

1.112 The Court in *Roseberry* also quoted the following comment of the English Court of Appeal in the *Howe* case.²⁴⁵

“Next it is often a matter of chance that death or serious injury results from even a serious breach. Generally where death is the consequence of a criminal act it is regarded as an aggravating feature of the offence, the penalty should reflect public disquiet at the unnecessary loss of life.”²⁴⁶

1.113 The Court in the *Roseberry* case commented that what had occurred at the building site “undoubtedly was an unnecessary loss of life.” The Court also rejected the suggestion that the company could in any substantial way mitigate its liability by saying, in effect “Well the sub-contractor and not myself and not my company, was directly in charge of digging the trench where the fatality occurred.” On this aspect, the Court concluded that it was “perfectly plain... that control of the site had been retained by *Roseberry Construction Ltd*.” The Court added that its failure to have a Safety Statement and the other

²⁴⁰ The 1989 Act has since been replaced by the *Safety, Health and Welfare at Work Act 2005*.

²⁴¹ [2001] 3 IR 390.

²⁴² [1999] 2 All ER 249.

²⁴³ *People (DPP) v Roseberry Construction Ltd and McIntyre* [2003] 4 IR 338, 340.

²⁴⁴ *People (DPP) v Roseberry Construction Ltd and McIntyre* [2003] 4 IR 338, 340.

²⁴⁵ *People (DPP) v Roseberry Construction Ltd and McIntyre* [2003] 4 IR 338, 340.

²⁴⁶ *R v F Howe & Sons (Engineers) Ltd* [1999] 2 All ER 249, 254.

failures significantly contributed to what occurred; that if the Safety Statement had been prepared, the risk would have been formally considered and no doubt something done about it. The Court added:

“It was the failure of any party to take the simple remedial measures that gave rise to the substantial legal and moral guilt which must be regarded as attaching in the circumstances of this case.”²⁴⁷

1.114 On this basis, the Court concluded that there had been no error in the fine which had been imposed in the Circuit Criminal Court and that, since the defendant was a successful company, the penalty was not excessive in the circumstances. A significant feature of the decision in the *Roseberry* case was the reference to the specific aggravating and mitigating factors identified in the English *Howe* case.

1.115 Similarly, in *People (DPP) v Loving*²⁴⁸ a child pornography case, the Court of Criminal Appeal referred approvingly to the categorisation of child pornography made by the English Court of Appeal in *R v Oliver*,²⁴⁹ where the court suggested the following graduated levels of seriousness in respect of images of child pornography:²⁵⁰

1. Images depicting erotic posing with no sexual activity;
2. Sexual activity between children solo or masturbation as a child;
3. Non-penetrative sexual activity between adults and children;
4. Penetrative sexual activity between children and adults;
5. Sadism or bestiality.

1.116 The Court in *Loving* also cited with approval the following comments of Rose LJ in the *Oliver* case, where he had suggested the following elements as being relevant to the offender's proximity to and responsibility for, the original abuse:²⁵¹

“Any element of commercial gain will place an offence at a high level of seriousness. In our judgment, swapping of images can properly be regarded as a commercial activity, albeit without financial gain, because it fuels demand for such material. Wide-scale distribution, even without financial profit, is intrinsically more harmful than a transaction limited to two or three individuals, both by reference to the potential use of the images by active paedophiles and by reference to the shame and degradation to the original victims.

Merely locating an image on the internet will generally be less serious than down-loading it. Down-loading will generally be less serious than taking an original film or photograph of indecent posing or activity ...”²⁵²

These examples indicate the influence of developments in other jurisdictions concerning sentencing principles and the appropriate grading of sentences within an offence.

1.117 In its *1996 Report on Sentencing*,²⁵³ the Commission identified a number of factors which would aggravate the seriousness of an offence:

“Aggravating factors

- (1) Whether the offence was planned or premeditated;

²⁴⁷ *People (DPP) v Roseberry Construction Ltd and McIntyre* [2003] 4 IR 338, 342.

²⁴⁸ [2006] 3 IR 355.

²⁴⁹ (2003) 1 Cr App R 28.

²⁵⁰ *People (DPP) v Loving* [2006] 3 IR 355, 362.

²⁵¹ *People (DPP) v Loving* [2006] 3 IR 355, 362.

²⁵² *R v Oliver* (2003) 1 Cr App R 28, 467.

²⁵³ Law Reform Commission *Report on Sentencing* (LRC 53-1996) Chapter 3.

- (2) Whether the offender committed the offence as a member of a group organised for crime;
- (3) Whether the offence formed part of a campaign of offences;
- (4) Whether the offender exploited the position of a weak or defenceless victim or exploited the knowledge that the victim's access to justice might have been impeded;
- (5) Whether the offender exploited a position of confidence or trust, including offences committed by law enforcement officers;
- (6) Whether the offender threatened to use or actually used violence, or used, threatened to use, or carried, a weapon;
- (7) Whether the offender caused, threatened to cause, or risked the death or serious injury of another person, or used or threatened to use excessive cruelty;
- (8) Whether the offender caused or risked substantial economic loss to the victim of the offence;
- (9) Whether the offence was committed for pleasure or excitement;
- (10) Whether the offender played a leading role in the commission of the offence, or induced others to participate in the commission of the offence;
- (11) Whether the offence was committed on a law enforcement officer;
- (12) Any other circumstances which:
 - (a) increase the harm caused or risked by the offender, or
 - (b) increase the culpability of the offender for the offence.²⁵⁴

1.118 The Commission also identified a number of factors which would mitigate the seriousness of an offence:

"Mitigating factors

- (1) Whether the offence was committed under circumstances of duress not amounting to a defence to criminal liability;
- (2) Whether the offender was provoked;
- (3) Whether the offence was committed on impulse, or the offender showed no sustained motivation to break the law;
- (4) Whether the offender, through age or ill-health or otherwise, was of reduced mental capacity when committing the offence;
- (5) Whether the offence was occasioned as a result of strong temptation;
- (6) Whether the offender was motivated by strong compassion or human sympathy;
- (7) Whether the offender played only a minor role in the commission of the offence;
- (8) Whether no serious injury resulted nor was intended;
- (9) Whether the offender made voluntary attempts to prevent the effects of the offence;
- (10) Whether there exist excusing circumstances which, although not amounting to a defence to criminal liability, tend to extenuate the offender's culpability, such as ignorance of the law, mistake of fact, or necessity;
- (11) Any other circumstances which:
 - (a) reduce the harm caused or risked by the offender, or
 - (b) reduce the culpability of the offender for the offence.²⁵⁵

²⁵⁴ Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 3.2.

1.119 The Commission is of the view that it would be useful to set out the factors which aggravate and mitigate the seriousness of an offence in statutory form.

(III) *Applying any Factors which Aggravate or Mitigate the Severity of a Sentence:*

1.120 The factors which aggravate or mitigate the severity of a sentence, as opposed to the seriousness of an offence, are those factors which are likely to affect an otherwise proportionate sentence. In its *1996 Report on Sentencing*,²⁵⁶ the Commission explained, and underlined the importance of, the distinction:

“The most important distinction drawn is that between factors which mitigate *offence seriousness* and factors which mitigate *sentence*.

Factors which aggravate or mitigate the offence arise for consideration when the sentencer is deciding the seriousness of the offending conduct for which the offender is to be held responsible. Although this may include a consideration of the state of mind or the culpability of the offender during the commission of the offence, the sentencer is, at this stage, primarily concerned with the offending behaviour rather than with the offender personally.

Factors which mitigate sentence arise later. When the sentencer considers these factors, he or she has decided the seriousness of the offending conduct for which the offender is responsible, but now asks if there is any reason why the offender should not suffer the full punishment which should attach to such responsibility or blameworthiness. Mitigation of sentence is the making of a concession: the sentencer is saying: ‘although you are undoubtedly responsible for the offending conduct and should be punished for it, I am letting you off a little because of your personal circumstances.’

If there is confusion between the two types of factors a problem arises. If the confused sentencer takes factors which mitigate sentence into account at the ‘determination of seriousness’ stage then the offender will be found to be less responsible or blameworthy than he or she actually is and the sentence may well give rise to controversy.”²⁵⁷

1.121 The Commission identified four factors which would ordinarily mitigate the severity of a sentence:

- “1. The offender has pleaded guilty to the offence;
2. The offender has assisted in the investigation of the offence or in the investigation of other offences;
3. The offender has attempted to remedy the harmful consequences of the offence;
4. The sentence, whether by reason of severe personal injury suffered by the offender in consequence of the offence, age, ill-health, or otherwise, would result in manifest hardship or injustice to the offender or his or her dependents.”²⁵⁸

To this list could be added factors such as “previous good character” and “the possibility of rehabilitation”.

1.122 The Oireachtas has provided limited guidance regarding the effect of a guilty plea and cooperation with law enforcement authorities. Section 29 of the *Criminal Justice Act 1999* provides that the courts may take a guilty plea into account when sentencing. In this regard, the courts should consider (a) the stage at which the person indicated an intention to plead guilty, and (b) the circumstances in which this indication was given. Notwithstanding a guilty plea, however, the courts may, in exceptional circumstances, impose the maximum sentence prescribed by law. In Chapter 3 the Commission will consider in greater detail the provisions of the *Misuse of Drugs Act 1977* and the *Firearms Acts* which provide that the courts may have regard to (i) whether the person pleaded guilty and (ii) whether the

²⁵⁵ Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 3.2.

²⁵⁶ Law Reform Commission *Report on Sentencing* (LRC 53-1996) Chapter 3.

²⁵⁷ Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraphs 3.5-3.8

²⁵⁸ Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 3.17.

person materially assisted in the investigation of the offence in determining whether to impose a presumptive minimum sentence.

1.123 The courts have provided more detailed guidance regarding the factors which mitigate the severity of a sentence. In *People (DPP) v Tiernan*,²⁵⁹ for instance, the Supreme Court indicated that the stage at which a *plea of guilty* was entered was a relevant consideration:

“[I]n the case of rape an admission of guilt made at an early stage in the investigation of the crime which is followed by a subsequent plea of guilty can be a significant mitigating factor. I emphasise the admission of guilt at an early stage because if that is followed with a plea of guilty it necessarily makes it possible for the unfortunate victim to have early assurance that she will not be put through the additional suffering of having to describe in detail her rape and face the ordeal of cross-examination.”²⁶⁰

1.124 In *R v King*²⁶¹ Lord Lane CJ indicated that the extent to which *cooperation with law enforcement authorities* may mitigate the severity of a sentence will depend on a number of factors:

“The quality and quantity of the material disclosed by the informer is one of the things to be considered, as well as the accuracy and the willingness or otherwise of the informer to give evidence against them in due course if required by the court. Another aspect to consider is the degree to which he has put himself and his family at risk by reason of the information he has given; in other words the risk of reprisal. No doubt there will be other matters as well. The reason behind this practice is expediency.”²⁶²

1.125 The extent to which an *attempt to remedy the harmful consequences of an offence* may mitigate the severity of a sentence will also depend on the circumstances of the case.²⁶³ In *People (DPP) v Princs*,²⁶⁴ a case concerning the sentence for manslaughter, it was argued in mitigation of the sentence that the respondent had attempted to save the deceased by stemming the flow of blood with towels or bandages. The Court of Criminal Appeal indicated that this merited limited credit as the respondent “never called for outside medical assistance even though he told the Gardaí that the deceased was alive after the stabbing for ten or fifteen minutes.”

1.126 In the same case, the Court of Criminal Appeal indicated that the trial judge had been right to taken into account the fact that *imprisonment would be particularly difficult* for the offender, who was a foreign national.²⁶⁵ Similarly, in *People (DPP) v H*,²⁶⁶ a case concerning the sentence for sexual offences which had been committed 30 years before, the Court of Criminal appeal indicated:

“The age and health of the offender should be looked at. If the offender is so elderly, or so unwell, then prison will be a special burden to bear, the sentence should reflect how a particular term may punish him as much [as] a longer term for a younger offender in reasonable health.”

1.127 In *People (DPP) v GK*²⁶⁷ the Court of Criminal Appeal distinguished between the effect of “*previous good character*” and the effect of previous convictions:

²⁵⁹ [1988] IR 250.

²⁶⁰ *People (DPP) v Tiernan* [1988] IR 250, 255.

²⁶¹ (1986) 82 Cr App R 120. See O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 6-33.

²⁶² (1986) 82 Cr App R 120, 122.

²⁶³ See O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 6-33.

²⁶⁴ [2007] IECCA 142.

²⁶⁵ *People (DPP) v Princs* [2007] IECCA 142. See O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 6-87.

²⁶⁶ [2007] IEHC 335.

²⁶⁷ [2008] IECCA 110.

“This court is satisfied that while previous good character is relevant to the character and circumstances of the accused which may be mitigating factors in terms of sentence previous convictions are relevant not in relation to mitigation of sentence but in aggravation of offence.”

1.128 In *People (DPP) v Kelly*,²⁶⁸ a case concerning the sentence for manslaughter, the Court of Criminal Appeal indicated that it would have to “give considerable weight to the absence of previous convictions.”²⁶⁹

1.129 Regarding the *possibility of rehabilitation*, the Supreme Court in *People (DPP) v M*²⁷⁰ stated:

“As was stated in the judgments of the Court of Criminal Appeal... an essential ingredient for consideration in the sentencing of a person upon conviction, in any case in which it is reasonably possible is the chance of rehabilitating such person so as to re-enter society after a period of imprisonment...”²⁷¹

Having regard to the accused’s age, the stage at which he would re-enter society, the age he would be at that time and the period of life remaining to him, the Court thus concluded that an overall sentence of 18 years should be reduced to 12 years.

(c) Consistency

1.130 The principle of consistency has traditionally been explained in terms of like cases being treated alike and different cases being treated differently.²⁷² The corollary of this is that inconsistency can be explained in terms of like cases being treated differently and different cases being treated alike. It should be noted, however, that when we refer to consistency we are referring to consistency of *approach* rather than consistency of *outcomes*.²⁷³ In the *Halliday Report*, it was observed that consistency could be recognised in terms of like cases resulting in like *outcomes* but:

“The variety of circumstances in criminal cases... makes this an incomplete definition, and one which can result in undesirable priority being given to apparently uniform outcomes, regardless of the circumstances. A better approach is to seek consistent application of explicit principles and standards, recognising that these may result in justifiably *disparate* outcomes.”²⁷⁴ [Emphasis added]

1.131 In its *2004 Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court*,²⁷⁵ the Commission took a similar approach by distinguishing between sentencing *disparity* and sentencing *inconsistency*:

“While sentencing *disparity* may be justified, given the nature of the offence and the individual circumstances of the offender, sentencing *inconsistency* is not acceptable, such as where individual judges may differ widely in dealing with similar offenders for similar offences.”²⁷⁶

²⁶⁸ [2005] 1 ILRM 19. See O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 6-44ff.

²⁶⁹ [2005] 1 ILRM 19 at 33.

²⁷⁰ [1994] 3 IR 306. See O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 6-41.

²⁷¹ *People (DPP) v M* [1994] 3 IR 306, 314.

²⁷² O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 3-01.

²⁷³ *Making Punishments Work - Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001) at paragraph 2.21.

²⁷⁴ *Making Punishments Work - Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001) at paragraph 2.21.

²⁷⁵ Law Reform Commission *Consultation Paper on Prosecution Appeals from Unduly Lenient Sentences in the District Court* (LRC CP 33-2004).

1.132 The need for a consistent approach becomes all the more obvious when one considers the numerous factors which may influence sentencers.²⁷⁷ Ashworth asserts that these factors fall into four broad categories. The first category relates to the views that sentencers may have regarding the facts of the case. The second category relates to the views that sentencers may have regarding the principles of sentencing. In this category, Ashworth includes views regarding the gravity of offences; the aims, effectiveness and relative severity of the available types of sentence; the general principles of sentencing; and, the relative weight of aggravating and mitigating factors. The third category relates to views regarding crime and punishment. In this category, Ashworth includes views regarding the aims of sentencing; the causes of crime; and, the function of courts passing sentence. The final category relates to the demographic features of sentencers. In this category, Ashworth lists age, social class, occupation, urban or rural background, race, gender, religion and political allegiance. These factors may influence sentencers to varying degrees. While sentencers are expected to have developed a high level of resistance to outside influences the Commission observes that no-one can be entirely immune.

1.133 Furthermore, sentencing is not an exact science so the principle of consistency cannot be applied in absolute terms and some degree of variation is inevitable.²⁷⁸ Indeed, it has been argued that this is a small price to pay for a justice system which guarantees individualised punishment.²⁷⁹ However, this argument should not be taken too far as a system which tolerates gross inconsistency is manifestly unfair and risks losing public confidence.²⁸⁰ In such circumstances, the Oireachtas may feel compelled to respond by circumscribing judicial discretion through the imposition of mandatory sentences or rigid sentencing guidelines.²⁸¹ In this regard, it has been observed that the challenge posed by the principle of consistency is “to eliminate undue disparity without replacing it with excessive uniformity.”²⁸²

(d) Openness/Transparency

1.134 Arguably, the principle of openness/transparency is a constitutional principle.²⁸³ It requires that sentencing be fair and be seen to be fair.²⁸⁴ Sentencing should be transparent in the context of particular sentencing decisions and in the context of sentencing practice. Thus, it is observed in the *Halliday Report* that reasons should be given for sentencing decisions, in a language that will be understood by everyone involved, and retained in a form which enables them to be retrieved for later reference.²⁸⁵ Furthermore, information regarding sentencing theory and practice should be made available to the public and any public misconceptions should be addressed directly with the aim of increasing public knowledge.²⁸⁶ The Commission observes that this enables members of the public to make informed

²⁷⁶ *Ibid* at paragraph 6.07. O'Malley observes: “Disparity and inconsistency are closely related concepts and... little turns on the difference between them. Both are concerned with the problem of discordance. Arguably, consistency is more concerned with incompatibility of particular decisions with avowed principles or previous practice, whereas disparity is more concerned with inequality and incongruity between particular decisions.” See O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 3-01.

²⁷⁷ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 35-36.

²⁷⁸ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 3-04.

²⁷⁹ *Ibid*.

²⁸⁰ *Ibid*.

²⁸¹ *Ibid*.

²⁸² *Ibid*.

²⁸³ Article 34 of the Irish Constitution provides that justice must, “save in exceptional circumstances prescribed by law”, be administered in public.

²⁸⁴ *Making Punishments Work - Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001) at paragraph 2.25.

²⁸⁵ *Ibid*.

²⁸⁶ *Ibid* at paragraph 2.26.

contributions to debates on the issue of sentencing. This, in turn, may filter through to the sentencing-decisions being made by the Oireachtas and the Executive.

1.135 O'Malley asserts that the principle of openness/transparency requires sentencing decisions to be announced in open court and supported by announced reasons.²⁸⁷ The provision of reasons serves both a normative and an instrumental goal.²⁸⁸ From a normative perspective, it is argued that a person affected by a decision has a moral right to know the reasons for it. From an instrumental perspective, an obligation to give reasons serves several purposes. First, it encourages sentencers to critically assess their decisions to ensure that they have considered all the relevant factors and given the appropriate weight to those factors. Second, it assists with the development of the law by ensuring that the factors and principles relevant to a particular decision have been recorded. Third, it enables sentenced persons to assess whether there are valid grounds for appeal or review and judges to determine whether a particular decision is compatible with the governing rules and principles.

1.136 While it is desirable that reasons be given for sentencing-decisions, the case law suggests that there is no duty to do so under Irish law.²⁸⁹ In *O'Mahony v District Judge Ballagh and DPP*,²⁹⁰ the District Court judge, Ballagh J, had convicted and sentenced the applicant without ruling on his submissions for a non-suit. The applicant sought to judicially review the decision but the High Court refused to grant an order of *certiorari* against the conviction. The applicant appealed to the Supreme Court and Murphy J, with whom Hardiman and Geoghegan JJ concurred, stated:

"I would be very far from suggesting that judges of the District Court should compose extensive judgments to meet some academic standard of excellence. In practice it would be undesirable - and perhaps impossible - to reserve decisions even for a brief period. On the other hand it does seem... that every trial judge hearing a case at first instance must give a ruling in such a fashion as to indicate which of the arguments he is accepting and which he is rejecting and, as far as is practicable in the time available, his reasons for so doing... [T]here is no suggestion that Judge Ballagh conducted the case otherwise than with dignity and propriety. It does seem to me, however, that in failing to rule on the arguments made in support of the application for a non-suit he fell 'into an unconstitutionality'..."²⁹¹

1.137 In *People (DPP) v Cooney*²⁹² the applicant, who had been convicted of manslaughter and sentenced to 14 years' imprisonment by the Central Criminal Court, sought leave to appeal the severity of the sentence. Leave was sought on the grounds that Carney J had erred in principle by failing to provide cogent reasons for his sentencing-decision and to consider any of the matters raised on behalf of the applicant in his plea of mitigation. Regarding the provision of reasons, the Court of Criminal Appeal stated:

"It cannot be said that as the law stands at present a sentencing judge is under an obligation to give reasons for the particular sentence which he imposes. It is, however, in our opinion fair to say that it is a desirable practice."

1.138 In *O'Neill v Governor of Castlereagh Prison*²⁹³ the applicants applied to judicially review the decision of the Minister for Justice, Equality and Law Reform to exclude them from consideration for release under the Good Friday Agreement. The High Court rejected their application and they appealed to the Supreme Court. One of their arguments was that the Minister, in responding to the application for judicial review, had failed to make full disclosure of the documents on which he had relied to exclude the

²⁸⁷ O'Malley "Sentencing Values and Sentencing Structures" [2003] JSIJ 130 at 139.

²⁸⁸ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 30-12.

²⁸⁹ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 30-14.

²⁹⁰ [2002] 2 IR 410.

²⁹¹ [2002] 2 IR 410, 416

²⁹² [2004] IECCA 19

²⁹³ [2004] 1 IR 298

applicants from the category of “qualified prisoners”. Keane CJ, with whom Denham, Murray, McGuinness and McCracken JJ concurred, stated:

“The authorities both in this court and the High Court accordingly support the proposition that, while it cannot be said that reasons must be given in the case of every administrative decision, such a duty may arise in circumstances where, unless such reasons are provided, the legitimate interests of a person may be affected. The authorities demonstrate that a failure to give reasons may invalidate the decision in cases where the decision maker is not exercising a quasi-judicial function, but is at the least required to observe fair procedures...”²⁹⁴

1.139 In *McAlister v Minister for Justice, Equality and Law Reform*,²⁹⁵ the applicant, who was serving a prison sentence, requested and was refused compassionate temporary release in order to visit his sick mother. The applicant sought an order quashing the decision of the Minister for Justice refusing temporary release and a declaration that he was entitled to reasons as to why his application had been refused. The High Court, *per* Finnegan P, observed:

“It has long been recognised that it is desirable that a quasi-judicial or administrative decision be capable of judicial review or appeal should be accompanied by reasons. That is not to say that a discursive judgment is required.”²⁹⁶

1.140 In a similar vein, O’Malley observes that it would not be practical to require sentencing courts to provide reasons for every sentence.²⁹⁷ He notes, however, that the possibility of requiring sentencing courts to provide reasons for “certain sentences, say prison sentences of less than six months which might be replaced with community-based penalties” is worth discussing.²⁹⁸

1.141 This accords, in general, with the approach taken by the English courts. In *R v Higher Education Funding Council, ex p. Institute of Dental Surgery*,²⁹⁹ Sedley J considered whether an administrative body was obliged to furnish reasons for the rating it had awarded the Institute of Dental Surgery for the purpose of funding. He concluded that there was no general duty to give reasons for a decision but that there were classes of case for which such a duty existed.³⁰⁰ One such class was where the subject matter was an interest so highly regarded by the law - for example, personal liberty - that fairness required reasons to be given as of right.

1.142 O’Malley observes that this case was decided before the *European Convention on Human Rights* became part of English law and that a more relevant English precedent would be *English v Emery Reimbold & Strick Ltd*,³⁰¹ which was decided after incorporation. Lord Phillips of Worth Matravers MR observed that while there was a general recognition at common law that it was desirable for judges to give reasons for their decisions it was not universally accepted as a mandatory requirement.³⁰² He noted,

²⁹⁴ *Ibid* at 315.

²⁹⁵ [2003] 4 IR 35.

²⁹⁶ *Ibid* at 44.

²⁹⁷ O’Malley “Sentencing Values and Sentencing Structures” [2003] JSIJ 130 at 139.

²⁹⁸ Section 3 of the *Criminal Justice (Community Service) Act 1983*, as amended by section 3 of the *Criminal Justice (Community Service) (Amendment) Act 2011*, provides that where a sentencing court is of the opinion that the appropriate sentence would be one of imprisonment for a period of 12 months or less, it must consider making a community service order instead. It does not, however, require the sentencing court to give reasons where it decides to impose a period of imprisonment.

²⁹⁹ [1994] 1 WLR 242.

³⁰⁰ *Ibid* at 259.

³⁰¹ [2002] 1 WLR 2409.

³⁰² *Ibid* at paragraph 15.

however, that justice would not be done if it were not apparent to the parties why one had won and the other had lost.³⁰³ As to the extent of reasons which should be given, he stated:

“[I]f the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge’s conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision.”³⁰⁴

1.143 The European Court of Human Rights has taken a similar approach regarding its interpretation of Article 6 (right to a fair trial) of the *European Convention on Human Rights*:

“The Court reiterates that, according to its established case law reflecting a principle linked to the proper administration of justice, judgments of courts and tribunals should adequately state the reasons on which they are based. The extent to which this duty to give reasons applies may vary according to the nature of the decision and must be determined in the light of circumstances of the case. Although Article 6(1) obliges courts to give reasons for their decisions, it cannot be understood as requiring a detailed answer to every argument. Thus, in dismissing an appeal, an appellate court may, in principle, simply endorse the reasons of the lower court’s decision.”³⁰⁵

1.144 The Commission concludes that while reasons might be desirable for certain sentences, it would not be practical to require sentencing courts to provide reasons for all sentences. To that extent, a requirement to provide reasons would enhance the value of the Irish Sentencing Information System; facilitate the conduct of future analytical research; contribute to the production of high-quality, consistent sentencing decisions; encourage informed public debate; and attract public confidence in the Irish sentencing system.

1.145 *The Commission provisionally recommends that the justice principle, comprising legality, proportionality, consistency, transparency/openness is a key principle of criminal sanctions and sentencing.*

(3) Economic Principle

1.146 The economic principle relates to constraints on the financial resources available to the criminal justice system.³⁰⁶ As a result of financial constraints it is not possible, for instance, to allocate a member of the Garda Síochána to each citizen. Thus, the criminal justice system - and, indeed, the sentencing system - must consider which measures, within those financial constraints, are likely to be the most *effective* in terms of achieving the aims of criminal justice system/criminal sanctions. This is the principle of effectiveness.

1.147 There are three limbs to the principle of effectiveness. First, a process should be objective-led - the objectives being clear and achievable. Second, the process should be monitored in order to determine whether the process is meeting the particular objectives. Third, the assumptions underlying the objectives should be clear.

1.148 In the context of sentencing, the first limb of the principle requires that sentencing be objective-led. In this regard, the Commission recalls the general aims of criminal sanctions, namely, punishment, deterrence, reform and rehabilitation, and reparation. As to whether these objectives are as clear and achievable as the principle of effectiveness requires is a matter for debate. There are a number of issues

³⁰³ *Ibid* at paragraph 16.

³⁰⁴ [2002] 1 WLR 2409, paragraph 19.

³⁰⁵ *Garcia Ruiz v Spain* ECtHR 21 January 1999, at paragraph 26; *Higgins v France* (1999) 27 EHRR 703; *Helle v Finland* (1998) 26 EHRR 159; *Ruiz Torija v Spain* (1995) 19 EHRR 542; *Hiro Balani v Spain* ECtHR 9 December 1994; *Van de Hurk v The Netherlands* (1994) 18 EHRR 481.

³⁰⁶ Walker “The Aims of a Penal System” *The James Seth Memorial Lecture 1966* (Edinburgh University Press, 1966) at 6. McAuley and McCutcheon *Criminal Liability* (Round Hall Sweet and Maxwell, 2000) at 105.

in this regard. The Commission notes, in the first place, that the general purposes of sentencing quite often appear to be aspirational rather than obtainable. Second, it is unclear whether they are of equal importance or whether one purpose should supersede the others.³⁰⁷ Third, the role of each branch of government in determining the purpose to be pursued in a given case is unclear. It has been argued, for instance, that the power to select from among the various purposes is a power to determine policy and should, therefore, be reserved to the Executive and/or Oireachtas rather than the judiciary.³⁰⁸

1.149 The second limb of the principle of effectiveness requires that sentencing be monitored to assess its performance in meeting the stated objectives. To facilitate such an assessment, the Commission notes that it would be necessary to identify the purpose or purposes being pursued by each sentencing option - custodial or non-custodial - and to agree on a system of benchmarks against which the performance of each option could be reviewed. The Commission acknowledges the work done to establish the Irish Sentencing Information System and observes that this collection may prove to be a useful resource for any future assessment. The Commission is not aware of any assessments having been conducted to date.

1.150 The third limb of the principle of effectiveness requires that the assumptions underlying the particular objective be clear. These are the important events, conditions or decisions outside the sentence that must prevail for the objective to be achieved. Thus, for example, if the purpose of rehabilitation is pursued, there must be facilities in place to support rehabilitation; or, if a provision is enacted to deal with a particular situation, that situation must prevail if the provision is to be justified; or, if a provision is enacted as part of a programme to deal with a particular type of offending, the other aspects of the programme must be in operation as well.

1.151 The Commission observes that an effective sentencing system attracts public confidence. The Irish sentencing system is objective-led but more research is required to assess how the system is meeting these objectives. Such research should consider whether the objectives pursued by sentencing are clear and achievable and whether the assumptions underlying the objectives prevail. While the principle of effectiveness is important to the sentencing system in general, the Commission notes that it is of particular relevance to mandatory sentencing. As noted above, mandatory sentencing provisions have the potential to impinge on the rights of the accused to a greater extent than discretionary sentencing provisions. Thus it is crucial that their use should be limited to situations in which it can be shown that they effectively pursue defined objectives which are based on clear and prevailing assumptions.

(4) Discussion

1.152 It is thus clear that criminal sanctions and sentencing are framed by a number of factors including the overarching aims of the criminal justice system; the aims of criminal sanctions; and the principles which safeguard citizens against excessive behaviour by the State.

1.153 Bearing these factors in mind one can expect a structured sentencing system in which: (1) the most severe sanctions, including lengthy prison sentences, are reserved for the most serious crimes; (2) less severe sanctions, including medium range prison sentences, are reserved for less serious crimes; and (3) the least severe sanctions including fines, probation orders and community service orders are reserved for the least serious crimes.

1.154 There are, however, a number of significant deficiencies in the Irish sentencing system - not least of which is the fundamental lack of consensus regarding the aims and principles which frame the sentencing process, their relative significance and how they should be implemented.

³⁰⁷ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 2-29ff; McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet and Maxwell, 2000) at Chapter 1; Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 62-63 .

³⁰⁸ Ashworth *Sentencing and Criminal Justice* (Butterworths, 2000) at 62.

D Deficiencies in the Irish Sentencing System

(1) Lack of Consensus

1.155 There is a fundamental lack of consensus regarding: (a) which aims and principles should frame the sentencing process; (b) their relative significance; and (c) the manner in which they should be implemented. The current approach, the “cafeteria approach”,³⁰⁹ leaves the determination of these matters to individual sentencing courts. As the outcome of such a determination can vary from court to court, there are inevitable implications for the humanitarian principle, the justice principle and the economic principle. These will be considered in greater detail below.

1.156 Thus in *People (DPP) v GK*,³¹⁰ for example, the Court of Criminal Appeal, *per* Finnegan J, indicated:

“This Court has to consider what is the appropriate sentence for this particular crime because it was committed by this particular offender... In discharging this function, the Court examines the matter from three aspects in the following order of priority, rehabilitation of the offender, punishment and incapacitation from offending and, individual and general deterrence.”

Thus, in order of priority, rehabilitation comes first, punishment and incapacitation come second, and deterrence comes third.

1.157 By contrast, in *People (DPP) v WD*,³¹¹ the Court of Criminal Appeal, *per* Charleton J, indicated:

“The function of a court in imposing sentence is manifold. It involves punishing the offender, protecting society and offering the possibility of rehabilitation through the humane disposal within the penal system of a violent perpetrator.”³¹²

While the court does not specify any order of priority, it might be inferred from the order in which the aims are mentioned that punishment comes first, the protection of society comes second and rehabilitation comes third.

1.158 In addition, it has been asserted that it is one thing to agree that sentencing courts should have discretion to tailor sentences to the individual circumstances of particular cases but quite another to suggest that sentencing courts should be free to choose a sentencing aim in particular cases.³¹³ The freedom to select from among the various sentencing aims, it is argued, is a freedom to determine policy, not a freedom to respond to unusual circumstances.³¹⁴ In this regard, it may be noted that the determination of policy is a role generally reserved to the Oireachtas.

1.159 The Commission observes that this issue might be addressed by agreeing to certain aims and principles being set out in statute.³¹⁵ As illustrated in Section F, this is the approach that has been adopted by a number of common law countries. In the Irish context, there are, at least, three ways in which this approach might work.³¹⁶ First, the statute might set out the aims and principles but leave it to the courts to determine the particular aim to be pursued in individual cases.³¹⁷ The problem with this approach is that while the Oireachtas determines policy at a very general level, sentencing courts are still permitted to determine policy in individual cases. Second, the statute might declare one aim as taking

³⁰⁹ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 84.

³¹⁰ [2008] IECCA 110.

³¹¹ [2008] 1 IR 308.

³¹² *People (DPP) v WD* [2008] 1 IR 308, 314.

³¹³ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 62; see also Young and Browning “New Zealand’s Sentencing Council” [2008] Crim LR 287 at 290.

³¹⁴ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 62.

³¹⁵ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 63.

³¹⁶ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 63.

³¹⁷ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 63.

priority over all other aims.³¹⁸ The problem with this approach is that it might be too rigid in light of the wide range of offences and offenders which appear before the sentencing courts. Third, the statute might declare a primary aim but provide that in certain types of case one or other aim might be given priority.³¹⁹ This approach seems to succeed where the others have failed in so far as it seeks to ensure that sentencing policy is determined by the Oireachtas while avoiding the rigidity that could interfere with the role of sentencing courts in individual cases.

(2) Potential Breach of the Humanitarian Principle

1.160 As noted at paragraph 1.53, the humanitarian principle, in its strongest form, prohibits the use of criminal sanctions which are considered to be inhumane by current standards. Bearing in mind constitutional and human rights safeguards, the Commission observes that there is a low risk of the Irish sentencing system running afoul of this aspect of the principle.

1.161 There is, however, a greater risk of the Irish sentencing system running afoul of the humanitarian principle in its milder form, namely, where it constrains the use of permitted criminal sanctions. In respect of the most severe criminal sanctions, namely, custodial sanctions, it has been asserted that the “most fundamental deficiency in the present system is the absence of anything remotely approximating to a consensus on who should be sent to prison and why they should be sent there.”³²⁰ A major contributory factor is the use of concepts such as the “custody threshold” and the “last resort” principle, which are, at best, ill-defined and difficult to interpret.

1.162 The Commission observes that this issue might be addressed by statutory definitions of the custody threshold and the last resort principle.³²¹ This might usefully be accompanied by a statutory declaration of the range of non-custodial and custodial sanctions available in Ireland.

1.163 In England and Wales, section 79(2) of the *Powers of the Criminal Courts (Sentencing) Act 2000*, which defines the custody threshold, provides that a court must not pass a custodial sentence unless it is of the opinion that the offence, or a combination of the offence and one or more offences, is so serious that only a custodial sentence can be justified for it.

1.164 The American Bar Association Criminal Justice Standards go further by combining a definition of the custody threshold and the last resort principle:

“(a) A sentencing court should prefer sanctions not involving total confinement in the absence of affirmative reasons to the contrary. A court may select a sanction of total confinement in a particular case if the court determines that:

- (i) the offender caused or threatened serious bodily harm in the commission of the offence,
- (ii) other types of sanctions imposed upon the offender for prior offences were ineffective to induce the offender to avoid serious criminal conduct,
- (iii) the offender was convicted of an offence for which the sanction of total confinement is necessary so as not to depreciate unduly the seriousness of the offence and thereby foster disrespect for the law, or
- (iv) confinement for a very brief period is necessary to impress upon the offender that the conduct underlying the offence of conviction is unlawful and could have resulted in a longer term of total confinement;

(b) A sentencing court should not select a sanction of total confinement because of community hostility to the offender or because of the offender’s apparent need for rehabilitation.”³²²

³¹⁸ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 63.

³¹⁹ Ashworth *Sentencing and Criminal Justice* (Butterworths, 3rd ed, 2000) at 63.

³²⁰ O’Malley “Comments on White Paper on Crime” [2010] 2 JSIJ 1 at 7. See also *Report of the Thornton Hall Project Review Group 2011* at 73.

³²¹ O’Malley “Comments on White Paper on Crime” [2010] 2 JSIJ 1 at 8.

(3) Potential Breach of the Justice Principle

(a) Legality Principle

1.165 As noted at paragraph 1.68, the legality principle requires that sentencing law be declared in advance and be clear, predictable and certain. The Commission observes that Irish sentencing law does not always meet these requirements.

1.166 Arguably, the situation is worst in relation to the aims and principles of criminal sanctions. At a very basic level, there is a lack of consensus regarding: (a) which aims and principles should frame the sentencing process; (b) their relative significance; and (c) the manner in which they should be implemented.³²³ It is thus left to individual sentencing courts to use their discretion to determine each of these matters in individual cases.³²⁴ In the absence of any form of guidance, however, the results of these determinations can vary from court to court, and case to case. This, in turn, gives rise to a lack of (public) understanding regarding: (a) the aims and principles which frame the sentencing process; (b) their relative significance; and (c) the manner in which they are implemented.

1.167 The situation is not much better in relation to statutory sentencing provisions. True, the legality principle, at times, may require no more than compliance with a statutory provision which prescribes a mandatory sentence or, where applicable, the jurisdictional limits of a sentencing court.³²⁵ In the majority of cases, however, the task may not be as clear-cut. Statutes do not provide the basis for many aspects of sentencing law. Where statutory sentencing provisions exist, they are dispersed among a wide variety of statutes, making them difficult to locate. In addition, statutory sentencing provisions tend to be sparse on detail - setting out the basic aspects of a particular sentence without elaborating on the specifics, such as aggravating and mitigating factors. Statutory sentencing provisions are developed in virtual isolation of each other and tend to be crime-specific. This causes statutory sentencing law to be unclear, at best, and incoherent or inconsistent, at worst.

1.168 The situation regarding sentencing case law is equally problematic. In the absence of a comprehensive set of principles and aims or body of law, sentencing policy varies from court to court, and case to case. Indeed, it is not always clear from the sentencing decision - where it has been reported - what policy approach has been adopted by the court or the extent to which aggravating or mitigating factors have been taken into account. While the Irish Sentencing Information System is an important development, it cannot be described as a comprehensive collection of sentencing decisions. Sentencing courts, for the most part, operate independently of each other and are not obliged to consider each other's sentencing decisions. Thus, individual sentencing courts tend to develop their own approaches to sentencing decisions.³²⁶ As a result, sentencing case law can be unclear, incoherent and inconsistent.

1.169 As will be illustrated throughout this Consultation Paper, the Commission observes that many of these problems arise in respect of the relatively confined area of mandatory sentencing. It is not clear which principles and aims of criminal sanctions are relevant in cases where a mandatory sentencing provision applies. Mandatory sentencing provisions are crime-specific and dispersed among a variety of statutes. As a result, there is a lack of coherency and consistency in mandatory sentencing.³²⁷ In addition, given the low level of judicial interpretation of some mandatory sentencing provisions, they can be difficult to interpret.

1.170 There is thus something to be said for the suggestion that a sentencing act be introduced to satisfy the legality requirement.³²⁸ The purpose of this act would be to set out in one legal instrument the

³²² O'Malley "Comments on White Paper on Crime" [2010] 2 JSIJ 1 at 8.

³²³ See *People (DPP) v GK* [2008] IECCA 110 and *People (DPP) v WD* [2008] 1 IR 308.

³²⁴ Maguire "Consistency in Sentencing" [2010] JSIJ 14 at 37.

³²⁵ O'Malley "Sentencing Values and Sentencing Structures" [2003] JSIJ 130 at 135.

³²⁶ Maguire "Consistency in Sentencing" [2010] JSIJ 14 at 37.

³²⁷ For example, regarding persistent offenders the approach taken by the *Criminal Justice Act 2006* is very different to the approach taken by the *Criminal Justice Act 2007*.

³²⁸ O'Malley "Sentencing Values and Sentencing Structures" [2003] JSIJ 130 at 135.

law related to sentencing. This would involve a consolidation and, no doubt, some clarification of existing sentencing law.

(b) Proportionality Principle

1.171 As noted at paragraph 1.70, the proportionality principle comprises constitutional proportionality and sentencing proportionality.

1.172 Regarding constitutional proportionality, the Commission has observed that the Oireachtas's power to enact statutory sentencing provisions is subject to the test of constitutional proportionality. As statutory sentencing provisions tend to be developed in isolation of each other, there is a risk that a statutorily prescribed sentence might appear proportionate to a particular offence but be disproportionate when assessed against the sentences prescribed for other offences. Thus, for instance, it has been asserted that it does not make sense to prescribe a presumptive sentence of five years for certain firearms offences when a presumptive sentence of 10 years has been prescribed for certain drugs offences.³²⁹

1.173 Regarding sentencing proportionality, the Commission has observed that this requires sentencing courts to impose a sentence that is proportionate to the gravity of the offence and the circumstances of the offender. There is little guidance or, at most, conflicting guidance, as to how the courts are supposed to determine the gravity of the offence or the relevant circumstances of the offender. As noted in paragraph 1.82, the two-tiered approach to sentencing has been advocated by the Supreme Court. This requires, at one level, the assessment of factors relating to the seriousness of the offence and, at another level, the assessment of factors relating to the severity of the sentence. In spite of this, however, it has been the tendency of the courts to list the aggravating and mitigating factors without any overt distinction as to whether they relate to seriousness or severity.

1.174 For instance, in *People (DPP) v Princs*,³³⁰ a case concerning the sentence for manslaughter, the Court of Criminal Appeal upheld the trial judge's list of mitigating factors, namely:

- “[The respondent] co-operated with the Gardaí in the investigation and admitted to them his part in the offence.
- He indicated at an early stage his willingness to plead guilty to the crime of manslaughter which in fact was the crime on which the Jury found him guilty.
- He showed immediate genuine remorse for the crime. He tried to save the deceased by the application of bandages which in any event could not be successful as immediate skilled medical attention would have been required.
- The Respondent was a person of good character with no previous convictions in this country or his home country.
- The offence was not ‘in any sense a premeditated act, but it was something which erupted spontaneously against a background of drink on both sides’.
- The extra burden which imprisonment in a foreign environment imposes on a foreign national including the increased sense of isolation which such persons may suffer due to limited English language skills and the fact that the Respondent has no family in this country who can give him some support by visiting him in prison.”

Arguably, most of these factors are relevant to the severity of sentence whereas “premeditation” is a matter more appropriately considered in relation to the seriousness of the offence.

1.175 Similarly, in *People (DPP) v H*³³¹ a case concerning the sentence for sexual offences which had been committed 30 years before, the Court of Criminal Appeal indicated:

³²⁹ This will be discussed in greater detail in Chapter 3.

³³⁰ [2007] IECCA 142.

³³¹ [2007] IEHC 335.

“The ordinary principles of mitigation and aggravation should be applied to the circumstances of the case. For instance, if there was a plea of guilt or if there were circumstances in the offender’s own background which might explain the depraved behaviour, then such circumstances might mitigate the penalty. If the offences were systematic; involved an abuse of trust; or involved predatory behaviour over a period of years; or multiple victims, then the tariff must reflect this.”

Arguably, a guilty plea and the offender’s background are matters relevant to the severity of sentence whereas the extent to which the offence is systematic, involves an abuse of trust etc is a matter relevant to the seriousness of the offence.

1.176 As noted at paragraph 1.120, the Commission observed in its *1996 Report on Sentencing*³³² that a failure to observe the distinction between factors relating to the seriousness of an offence and factors relating to the severity of a sentence could lead to disproportionate sentencing.³³³

1.177 In England and Wales, the former Sentencing Guidelines Council issued a sentencing guideline entitled *Overarching Principles: Seriousness*.³³⁴ The guideline refers to culpability and harm as the determinant factors of seriousness and lists the most important and most commonly occurring aggravating and mitigating factors. Sentencing guidelines in respect of particular offences provide more detailed guidance regarding the aggravating and mitigating factors which are likely to arise in respect of those offences.

1.178 The Commission observes that the development of a statutory sentencing framework would necessitate the collation and, at times, consolidation of sentencing law. This process would facilitate the development of a coherent sentencing policy which would guard against the enactment of incoherent or disproportionate sentencing provisions. And, the result of this process - a clear and coherent statement of the law - would guard against the imposition of disproportionate criminal sanctions. Such a statutory framework might usually set out and distinguish factors which relate to the seriousness of an offence and the factors which relate to the severity of a sentence. Sentencing guidelines might provide more detailed guidance regarding the process by which a proportionate sentence is to be determined.

(c) Consistency Principle

1.179 The Commission observes that sentencing in Ireland is perceived to be highly inconsistent, in particular, with regard to the implementation of mandatory sentencing.³³⁵ O’Malley attributes inconsistency to the “regional organisation of the lower courts, the dearth of formal contact between them and the undoubted duty of all judges to act independently”.³³⁶ Maguire, on the other hand, identifies the individualised sentencing system, the multiplicity of sentencing aims, and judicial variability as being the root causes.³³⁷ A couple of recent studies support the assertion that there is inconsistency in sentencing.³³⁸

³³² Law Reform Commission *Report on Sentencing* (LRC 53-1996), Chapter 3.

³³³ *Ibid* at paragraphs 3.5-3.8

³³⁴ *Guideline on Overarching Principles: Seriousness* (Sentencing Guidelines Council of England and Wales, 2004).

³³⁵ Dáil Debates, Official Report - Unrevised, Vol. 673 No. 1, Thursday, 29th January 2009, Order of Business, Mr Flanagan; Dáil Debates, Official Report - Unrevised, Vol. 676 No. 2, Wednesday, 25th February 2009, Priority Questions, Mr Flanagan, paragraph 40; Dáil Debates, Official Report - Unrevised, Vol. 706 No. 2, Thursday, 1st April 2010, Written Answers, Mr Bruton, paragraph 107.

³³⁶ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 3-06.

³³⁷ Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 18-28.

³³⁸ Maguire “Consistency in Sentencing” [2010] JSIJ 14; and Hamilton “Sentencing in the District Court: ‘Here be Dragons’” (2005) 15(3) ICLJ 9a.

(i) 2007 Study

1.180 In a 2007 study,³³⁹ a number of District Court judges were interviewed and asked to respond to several sentencing vignettes.³⁴⁰ The purpose of the study was to explore (i) judicial views on sentencing and consistency in sentencing; (ii) the degree of consistency in sentencing between individual judges; and (iii) the reasons for inconsistency, if any, in sentencing practices of individual judges.

1.181 The study made several findings regarding judicial views on sentencing. The judges' descriptions of sentencing appeared to correspond with the "instinctive synthesis" approach to sentencing.³⁴¹ While most judges indicated that there was no tariff or "going rate",³⁴² some indicated that judges developed their own views of things or their own particular approaches to certain types of cases and penalties.³⁴³ Some judges rejected the idea that consistency in sentencing was possible in an individualised system.³⁴⁴ It would appear, however, that "consistency" in this context referred to consistency of outcomes rather than consistency of approach.

1.182 The study also made several findings regarding the degree of consistency in sentencing between individual judges. Overall there were high levels of inconsistency when the sentencing outcomes of the different District Court judges were compared.³⁴⁵ The degree of inconsistency in sentencing outcomes varied according to the seriousness of the offence.³⁴⁶ The sentencing outcomes were most consistent for the most serious case whereas they were least consistent for the least serious case. Inconsistency was most pronounced in relation to the type of penalty judges would impose, and was particularly apparent in relation to the choice between different non-custodial sanctions.³⁴⁷ The less serious the case the more likely the judges were to agree that it warranted a non-custodial sanction, and the more likely they were to disagree about which non-custodial sanction to impose. The more serious the case the more likely the judges were to impose a custodial sanction and the more likely they were to agree about the type of custodial sanction. Even when judges agreed about the type of penalty to impose in a particular case, they disagreed, in some cases quite significantly, about the quantum of penalty to impose.

1.183 At the same time, several general patterns in sentencing were identified.³⁴⁸ In relation to the assault vignette, for instance, one group comprised those who would impose some form of financial penalty; a second group comprised those who would either impose a financial penalty or a more severe penalty such as community service, prison or a suspended sentence; and a third group comprised those who would impose either a community service order, prison sentence or suspended sentence. A general

³³⁹ Maguire "Consistency in Sentencing" [2010] JSIJ 14 at 31 ff.

³⁴⁰ 15 out of a total of 54 District Court Judges participated in the study.

³⁴¹ Maguire indicates that this approach involves the judge considering all the relevant factors of the case, including the circumstances of the offence and the offender, and then coming to a decision about the appropriate sentence without indicating the precise weight being attributed to individual factors or groups of factors. Maguire "Consistency in Sentencing" [2010] JSIJ 14 at 34.

³⁴² Maguire "Consistency in Sentencing" [2010] JSIJ 14 at 34.

³⁴³ *Ibid* at 35 and 36. Maguire highlights a "fundamental contradiction" in the logic of the judges: "[W]hile they explicitly recognised that a general tariff would be inconsistent with the need to respond to the uniqueness of each case they did not seem to recognise that the adoption by them of their individual approaches (developed incrementally over a period of time) might also be inconsistent with the need to respond to the uniqueness of each case." Maguire "Consistency in Sentencing" [2010] JSIJ 14 at 37.

³⁴⁴ Maguire "Consistency in Sentencing" [2010] JSIJ 14 at 37.

³⁴⁵ *Ibid* at 42.

³⁴⁶ *Ibid* at 42.

³⁴⁷ *Ibid* at 43.

³⁴⁸ Maguire "Consistency in Sentencing" [2010] JSIJ 14 at 44.

pattern also emerged in respect of sentencing heroin-addicted offenders.³⁴⁹ Most judges indicated that they would offer the offender an opportunity to get drug treatment in order to avoid a prison sentence. In general, if the offender was successful and complied with all the requirements the court had imposed, the judges indicated that he or she should face a non-custodial penalty. However if the offender was unwilling to engage in drug treatment, the majority of judges indicated that they would impose a prison sentence.³⁵⁰ In addition, a uniform rationale emerged in respect of the imprisonment of persistent offenders.³⁵¹ Many judges indicated that they would impose an immediate prison sentence principally because the offender had had previous chances and had refused to change.

1.184 The study concluded that inconsistencies in the sentencing outcomes could be traced back to several discrete factors, all of which related to inconsistency in approach. These included differences in how judges interpreted the facts of the case, especially the seriousness of the offence; differences in the weight they attached to certain factors, in particular aggravating and mitigating factors; differences in judicial views regarding the appropriateness of different penalties for certain offenders and offences; and differences in the sentencing objectives prioritised.³⁵² Maguire thus asserts that reducing inconsistency in Ireland will require “addressing the incoherency of current sentencing policy and law, as well as trying to mitigate the worst effects of judicial variability”.³⁵³

(ii) 2003 Study

1.185 In 2003, the Irish Penal Reform Trust undertook a study into sentencing patterns in the Dublin District Court.³⁵⁴ The study was carried out over an 8-week period by two IPRT researchers who observed proceedings in the Dublin District Court. The purpose of the study was to (i) identify how judges use the sentencing options open to them and the patterns, if any, in their choices; and (ii) determine how often reasons are given for sentences. The study found that judges rarely made explicit connections between custodial sanctions and rationales for imprisonment. When they did speak of rationales, however, they demonstrated no coherent policy. Thus there was little consistency in approach. Researchers also witnessed very different outcomes for cases with very similar factual matrices. For the same minor offence, the penalty ranged from a simple reprimand to a fine to a recorded conviction that restricted employment opportunities and might expose an impecunious offender to the risk of imprisonment. Thus there was little consistency in outcomes.

1.186 By setting out the principles and aims, and providing guidance as to how they should be implemented, the Commission observes that a statutory sentencing framework would reduce the current level of inconsistency in sentencing. Sentencing guidelines might provide more detailed guidance regarding the procedure to be followed by sentencing courts.

(d) Openness/Transparency Principle

1.187 The Commission observes that sentencing law could be more open/transparent. The aims and principles which frame the sentencing process are not set out in a comprehensive manner. In addition, statutory sentencing provisions tend to be developed in virtual isolation of each other and dispersed among a wide variety of statutes. Furthermore, sentencing courts are not required, nor should they be, to provide reasons for every decision. As a result, it can be difficult for members of the public, including the offender, to identify the factors which have informed particular sentencing decisions.

³⁴⁹ *Ibid* at 45.

³⁵⁰ The author observes, however, that at the time of the research there was only one dedicated Drug Treatment Court in Dublin’s North Inner City, and so in reality very few of the judges who participated in the research would have been able to refer offender to this court. Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 45.

³⁵¹ Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 45-46.

³⁵² Maguire “Consistency in Sentencing” [2010] JSIJ 14 at 47.

³⁵³ *Ibid* at 52.

³⁵⁴ Hamilton “Sentencing in the District Court: ‘Here be Dragons’” (2005) 15(3) ICLJ 9a.

1.188 The Commission observes that a statutory sentencing framework, comprising a comprehensive statute and a judicial council empowered to develop sentencing guidelines, would alleviate this problem by making available reliable and accessible information on sentencing in the public domain. This would give the public greater clarity regarding - and, arguably, greater confidence in - the Irish sentencing system. It would also encourage members of the public to engage in and assess public debates on sentencing by reference to reliable information rather than rhetoric.³⁵⁵ In particular, it would assist the public to weigh up the costs and benefits of various proposals, including their fiscal and resource implications. This would, in turn, help to distil those situations in which sentencing reform, in the form of more mandatory or more punitive criminal sanctions, is really necessary from those situations in which it is not.

(4) Potential Breach of the Economic Principle

1.189 Bearing in mind the economic constraints on the choice of criminal sanctions, the Commission observes that more could be done to ensure that the criminal sanctions being imposed are effective. The aims of criminal sanctions could be clearer, in terms of being set out in a comprehensive manner, and it is debatable as to whether they are, in all circumstances, achievable. Furthermore, there has been little, if any, analysis as to whether the criminal sanctions being employed are achieving these aims or, indeed, the discrete aim of the particular piece of legislation.

(5) Discussion

1.190 The fact that there are a number of significant deficiencies in the Irish sentencing system seems to suggest that there is a need for more structure in sentencing. Before dealing with how that structure might be achieved, it is useful to begin with an examination of the current position in Ireland on structured sentencing and guidelines.

E The Current Position in Ireland on Structured Sentencing and Sentencing Guidelines

1.191 It has been noted that Ireland, by contrast with most common law jurisdictions, has a largely unstructured sentencing system³⁵⁶ in which the courts exercise a relatively broad sentencing discretion.³⁵⁷ Sentencing discretion is, of course, constrained by the sentencing aims and principles discussed in this chapter, but in practice sentencing judges have a wide measure of discretion in individual cases. In this section, the Commission considers the extent to which appellate review might contribute to a structured approach. The Commission also discusses the extent to which the courts in Ireland have developed some elements of a structured approach, including the use of general guidance or guidelines. Finally, the Commission considers the development, under the auspices of the Courts Service, of the Irish Sentencing Information System (ISIS).

(1) Judicial Structure

(a) Appellate Review

1.192 In its *1993 Consultation Paper on Sentencing*,³⁵⁸ the Commission observed that the “ability of the courts to formulate a coherent sentencing policy is to a large degree determined by the structure within which they must operate”.³⁵⁹ In particular, the principle of co-ordinate jurisdiction means that judges of the same court are, by and large, free to disregard each other’s sentencing decisions. As a result, it is in the appellate courts where sentencing policy is primarily shaped. The obvious advantage of this approach is that appellate courts are uniquely situated to offer effective guidance on many key

³⁵⁵ O’Malley “Comments on White Paper on Crime” [2010] 2 JSIJ 1 at 9-11; Young and Browning “New Zealand’s Sentencing Council” [2008] Crim LR 287 at 292; Kilaru “Guidelines as Guidelines: Lessons from the History of Sentencing Reform” (2010) 2 Charlotte L Rev 101 at 110.

³⁵⁶ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 3-06.

³⁵⁷ Maguire “Consistency in Sentencing” [2010] JSIJ 14.

³⁵⁸ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993).

³⁵⁹ *Ibid* at paragraph 3.21.

aspects of sentencing.³⁶⁰ The Commission observes, however, that there are a number of significant disadvantages of relying on appellate review to provide sentencing guidance.

1.193 First, the appellate courts lack a sufficient volume of sentencing appeals from which to develop considered and principled sentencing guidance.³⁶¹ Having said that, the volume of cases being appealed today is larger than the volume of cases being appealed at the time the Commission's Consultation Paper and Report were published. By contrast to the situation which prevailed in 1993 and 1996, the defence and the prosecution may now appeal against a sentencing decision. However, the fact that appeals are confined to situations in which there has been an "error of principle"³⁶² means that there are relatively few opportunities for appellate courts to develop sentencing guidance.

1.194 Second, even when the opportunity does arise to develop sentencing guidance, appellate courts are limited to a case-by-case consideration.³⁶³ Thus sentencing guidance develops in fragments over a protracted period of time.³⁶⁴ Guidance will more than likely be limited to the particular circumstances of the case. Furthermore there may be more guidance in relation to indictable offences and imprisonment than in relation to more commonly-prosecuted offences, in particular those which are disposed of summarily.³⁶⁵ In addition, while this may lead to greater cohesion in sentencing for particular offences it provides little room to generate cohesion in overall sentencing patterns.³⁶⁶

1.195 Third, appellate courts operate in an information vacuum.³⁶⁷ They lack the full range of perspectives, experience and expertise.³⁶⁸ By and large, they will be dependent on the information submitted by counsel and any other presentence reports. As these will inevitably relate to the circumstances of the particular offence and the particular offender, they do not, in general, provide the basis for wider analysis of sentencing and its impact.³⁶⁹ In any case, courts are subject to time constraints such that even if it was provided with adequate resources it would not have the time to consider them all.³⁷⁰ It is also debatable as to whether the courts would be a proper forum for conducting such research.³⁷¹

1.196 Fourth, the dissemination of appellate decisions is somewhat unstructured. As the Commission observed in its *1993 Consultation Paper*:

"[T]here is no satisfactory system of dissemination of appellate policy decisions to the lower courts and to those involved in the sentencing process. A high proportion of the sentencing judgments of the Court of Criminal Appeal are delivered extemporaneously - so it is unlikely that many other than those present at the hearing will learn of their import. But even written

³⁶⁰ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 3-15.

³⁶¹ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 3.22.

³⁶² O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 34-09ff.

³⁶³ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph at paragraph 3-10.

³⁶⁴ *Ibid* at paragraph 3-15.

³⁶⁵ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 3-15; Young and Browning "New Zealand's Sentencing Council" [2008] Crim LR 287 at 289.

³⁶⁶ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 58-59.

³⁶⁷ Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 3.23. See also Hammond "Intuitive Synthesis or Structured Discretion?" (2007) NZLR 211 at 231-232.

³⁶⁸ Young and Browning "New Zealand's Sentencing Council" [2008] Crim LR 287 at 289.

³⁶⁹ *Ibid*.

³⁷⁰ *Ibid*.

³⁷¹ Young and Browning "New Zealand's Sentencing Council" [2008] Crim LR 287 at 289.

judgments of the Court of Criminal Appeal are not well reported... The systematic reporting of sentencing judgments would be of some assistance in the development of sentencing policy..."³⁷²

(b) Judicial Guidelines

1.197 It is clear that the courts in Ireland have been reluctant to set out rigid sentencing guidelines that would completely constrain sentencing discretion or which would establish a sentencing "tariff" in specific cases. It is equally clear that the courts have developed some indicative guidelines for specific offences.

1.198 In *People (DPP) v Tiernan*³⁷³ the Supreme Court was asked to consider the "guidelines which the courts should apply in relation to sentences for the crime of rape".³⁷⁴ The Supreme Court decided that, having regard to its appellate jurisdiction, the Court should deal only with issues arising in individual cases and should not set down a standard or tariff of penalties of general application. In this regard, Finlay CJ observed:

"Having regard to the absence of any statistics or information before this Court in this appeal concerning any general pattern of sentences imposed for the crime of rape within this jurisdiction, general observations would not be appropriate. Furthermore, having regard to the fundamental necessity for judges in sentencing in any form of criminal case to impose a sentence which in their discretion appropriately meets all particular circumstances of the case (and very few criminal cases are particularly similar), and the particular circumstances of the accused, I would doubt that it is appropriate for an appellate court to appear to be laying down any standardisation or tariff of penalty for cases."³⁷⁵

It is not clear from this whether the Supreme Court was more influenced by the lack of statistical data or its perception that to establish a tariff would be incompatible with an individualised system of sentencing.

1.199 In any case, it would appear that the Supreme Court had greater reservations in relation to guidelines in the form of sentencing tariffs than guidelines in the form of sentencing principles. Thus, despite its reluctance to establish a sentencing tariff, the Supreme Court articulated a number of general principles in relation to sentencing for rape,³⁷⁶ the most basic one being that save in exceptional circumstances rape should always attract "a substantial immediate custodial sentence".³⁷⁷

1.200 The decision in *Tiernan* clearly indicates an antipathy to any sentencing tariff that would remove sentencing discretion in an individual case. At the same time the Court indicated that, given the clear labelling by the Oireachtas of the seriousness of the offence of rape as carrying a maximum sentence of life imprisonment, it also indicated that a substantial immediate custodial sentence was appropriate except in exceptional circumstances. This is somewhat different to the approach taken by the Oireachtas to drugs and firearms offences where a specified minimum sentence of 10 or five years is prescribed, but it is notable that in *Tiernan*, the *Misuse of Drugs Act 1977* and the *Firearms Acts* there are references to a presumption of custodial sentences, subject to exceptional circumstances. This might be seen as an attempt to preserve judicial discretion in individual cases.

1.201 As noted at paragraphs 1.89-1.129, a number of decisions since the *Tiernan* case suggest that the courts are prepared to provide further guidance, in particular by reference to aggravating and mitigating factors

³⁷² Law Reform Commission *Consultation Paper on Sentencing* (LRC CP 2-1993) at paragraph 3.24.

³⁷³ [1988] IR 250.

³⁷⁴ Section 29 of the *Courts of Justice Act 1924*.

³⁷⁵ [1988] IR 250, 254.

³⁷⁶ [1988] IR 250, 255.

³⁷⁷ *Ibid* at 253.

(2) The Irish Sentencing Information System (ISIS)

1.202 The Irish Sentencing Information System (ISIS) is a relatively new development in Ireland which, in time, may contribute significantly to a more structured sentencing system. The ISIS, which is broadly similar to systems in New South Wales and Scotland,³⁷⁸ is a searchable database of the sentencing decisions of the Dublin and Cork Circuit Criminal Courts.³⁷⁹ It is intended that the extent to which, and the way in which, a judge uses the ISIS is a matter entirely within the judge's discretion.³⁸⁰ It has been noted, however, that the ISIS in its ultimate form might assist judges to form preliminary views as to appropriate sentences, deal with unusual features of cases; and locate offences on the spectrum of sentences.³⁸¹

1.203 The Commission notes that, at present, ISIS is a relatively limited information tool in a number of respects. The database refers to a selection of sentencing decisions from the Circuit Criminal Court in Dublin and, to a lesser extent, Cork. In addition, the database does not provide any formal analysis of the sentencing decisions. Furthermore, the database's potential is hampered by the principle of co-ordinate jurisdiction, which provides that judges of the same court are, by and large, free to disregard each other's sentencing decisions.

1.204 Bearing in mind that ISIS is based on comparable sentencing databases developed in New South Wales and Scotland, the Commission acknowledges that this, together with the developments in case law already noted, indicates that the sentencing system in Ireland has already been influenced by developments in other countries.

(3) Discussion

1.205 It is clear from this that the appeal courts, the courts and the Irish Sentencing Information System each have a role in enhancing the structure of the Irish sentencing system. It is equally clear, however, that they alone cannot achieve the structure necessary to deal with the deficiencies in the system. There is thus a need for an additional mechanism to supplement the existing level of structure while ensuring that vital aspects of the current system, namely, judicial independence and discretion, are preserved. As to the form that this mechanism should take, the Commission considers a number of recent reports which deal with the issue of sentencing.

(a) Report of the Thornton Hall Project Review Group 2011

1.206 The Thornton Hall Project Review Group was set up to examine the need for prison accommodation and the development at Thornton Hall of a new prison. In its 2011 Report,³⁸² the Review Group made a number of recommendations which are relevant to this Consultation Paper. It found that prison conditions could not be improved without an "all encompassing strategic review of penal policy" including, but not limited to, "sentencing policies".³⁸³ It also found that there was a lack of statistical information on sentencing practice in the courts and suggested that it would be desirable to extend the collection of sentencing information through the ISIS or a similarly structured system.³⁸⁴ It also raised the

³⁷⁸ Conroy & Gunning "The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool" [2009] 1 JSIJ 37 at 38.

³⁷⁹ Conroy & Gunning "The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool" [2009] 1 JSIJ 37 at 38.

³⁸⁰ Conroy & Gunning "The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool" [2009] 1 JSIJ 37 at 38.

³⁸¹ Conroy & Gunning "The Irish Sentencing Information System (ISIS): A Practical Guide to a Practical Tool" [2009] 1 JSIJ 37 at 53.

³⁸² *Report of the Thornton Hall Project Review Group 2011*.

³⁸³ *Ibid* at 72.

³⁸⁴ *Report of the Thornton Hall Project Review Group 2011* at 73.

possibility of “judicially framed guidelines” forming part of the programme for the proposed Judicial Council³⁸⁵ and expressed its hope to create a penal system that was both “principled and sustainable”.³⁸⁶

(b) Report of the Working Group on the Jurisdiction of the Courts 2003

1.207 The *Working Group on the Jurisdiction of the Courts*³⁸⁷ did not examine the issue of sentencing in sufficient depth to make concrete recommendations. It did, however, find that there was a need for some system of objective guidance for sentencing judges and discussed the option of creating a statutory body charged with providing statutory guidelines.³⁸⁸

(c) Report of the Committee on Judicial Conduct and Ethics (The Keane Report) 2000

1.208 Following a recommendation of the Working Group on a Courts Commission, considered at paragraph 1.209, the Committee on Judicial Conduct and Ethics (The Keane Committee) was established by the Chief Justice in 1999 to, among other matters:

“[A]dvise on... the establishment of a judicial body which would contribute to high standards of judicial conduct, establish a system for the handling of complaints of judicial conduct, and other activities such as are taken by similar bodies elsewhere...”³⁸⁹

1.209 In its 2000 Report³⁹⁰ the Keane Committee recommended the establishment of a Judicial Council which would have “functions similar in some respects to those of the judicial commission established in New South Wales.”³⁹¹ Among its responsibilities, the Report recommended that the Judicial Council, through a Judicial Studies Committee, should:

“...undertake responsibility for the establishment of a sentencing information system similar to that already in existence in New South Wales. This takes the form of a computerised data base containing legally and statistically relevant information on sentencing... This might in turn form part of a judicial information system which would not be restricted to sentencing and would seek to meet the research requirements of all the courts.”³⁹²

(d) Report of the Working Group on a Courts Commission 1998

1.210 The establishment of the Keane Committee had been inspired by the *1998 Report of the Working Group on a Courts Commission*³⁹³ which had recommended the establishment of a Committee:

“(d) to advise on and prepare the way, if determined appropriate, for the establishment of a judicial body which would contribute to high standards of judicial conduct and establish a system for the handling of complaints of judicial conduct...”³⁹⁴

1.211 The 1998 Report had, in turn, been preceded by the Commission’s *1996 Report on Sentencing*.³⁹⁵

³⁸⁵ *Ibid.*

³⁸⁶ *Ibid* at 74.

³⁸⁷ *Report of the Working Group on the Jurisdiction of the Courts 2003.*

³⁸⁸

<http://www.courts.ie/Courts.ie/Library3.nsf/16c93c36d3635d5180256e3f003a4580/0dcce31243771e6680256e270055011b?OpenDocument>

³⁸⁹ *Report of the Committee on Judicial Conduct and Ethics* (Government Publications, 2000) at 1.

³⁹⁰ *Ibid* at 52-53.

³⁹¹ *Report of the Committee on Judicial Conduct and Ethics* (Government Publications, 2000) at 52.

³⁹² *Ibid* at 57.

³⁹³ *Sixth Report of the Working Group on a Courts Commission 1998* (Government Publications, 1999).

³⁹⁴ *Ibid* at 175-176.

³⁹⁵ Law Reform Commission *Report on Sentencing* (LRC 53-1996).

(e) Commission's 1996 Report on Sentencing

1.212 In its 1996 *Report on Sentencing*,³⁹⁶ the Commission unanimously recommended that statutory sentencing guidelines should not be introduced in Ireland.³⁹⁷ By a majority the Commission recommended that non-statutory guidelines be introduced to link the severity of the sentence to the seriousness of the offending behaviour.³⁹⁸ Dissenting from this recommendation, the minority considered that while there was room for further identification and refinement of the criteria by which judicial discretion should be exercised, the task should continue to be the responsibility of the judiciary itself.³⁹⁹

(f) Discussion

1.213 The tenor of the recommendations contained in the more recent reports and, indeed, the minority view of the Commission's 1996 *Report on Sentencing*,⁴⁰⁰ is that a Judicial Council should be established with responsibility for developing sentencing guidelines. In furtherance of these recommendations, in 2010, the *General Scheme of the Judicial Council Bill* was published⁴⁰¹ and, in 2011, an interim Judicial Council was established.⁴⁰² The Commission supports these developments and observes that the Judicial Council would be an appropriate body to develop and publish suitable guidance or guidelines on sentencing that are consistent with the sentencing principles already discussed.

F Comparative Analysis

(1) England and Wales

1.214 Part 12 of the *Criminal Justice Act 2003* deals with sentencing. It starts by setting out the purposes of sentencing which include the punishment of offenders; the reduction of crime (including by deterrence); the reform and rehabilitation of offenders; the protection of the public; and the making of reparation by offenders to persons affected by their offences.⁴⁰³

1.215 It proceeds to provide guidance regarding the determination of the seriousness of an offence.⁴⁰⁴ In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.⁴⁰⁵ In considering the seriousness of an offence ("the current offence") committed by an offender who has one or more previous convictions, the court must treat each previous conviction as an aggravating factor if (in the case of that conviction) the court considers that it can reasonably be so treated having regard, in particular, to (a) the nature of the offence to which the conviction relates and its relevance to the current offence, and (b) the time that has elapsed since the

³⁹⁶ Law Reform Commission *Report on Sentencing* (LRC 53-1996).

³⁹⁷ *Ibid* at paragraph 2.22.

³⁹⁸ *Ibid*.

³⁹⁹ Law Reform Commission *Report on Sentencing* (LRC 53-1996) at paragraph 2.25.

⁴⁰⁰ Law Reform Commission *Report on Sentencing* (LRC 53-1996).

⁴⁰¹ The *General Scheme of the Judicial Council Bill* is available at: <http://www.justice.ie/en/JELR/General%20Scheme%20Judicial%20Bill.pdf/Files/General%20Scheme%20Judicial%20Bill.pdf>.

⁴⁰² "Interim Judicial Council to be set up", *The Irish Times*, 19 November 2011.

⁴⁰³ Section 142(1) of the *Criminal Justice Act 2003*. Section 142(2) provides that these purposes do not apply in certain situations while section 142A makes special provision for offenders who are under 18 years of age.

⁴⁰⁴ Section 143 of the *Criminal Justice Act 2003*.

⁴⁰⁵ Section 143(1) of the *Criminal Justice Act 2003*.

conviction.⁴⁰⁶ In considering the seriousness of any offence committed while the offender was on bail, the court must treat the fact that it was committed in those circumstances as an aggravating factor.⁴⁰⁷

1.216 It provides guidance as to how guilty pleas should be treated for the purpose of reducing sentences.⁴⁰⁸ In determining what sentence to pass on an offender who has pleaded guilty to an offence in proceedings before that or another court, a court must take into account (a) the stage in the proceedings for the offence at which the offender indicated his intention to plead guilty, and (b) the circumstances in which this indication was given.⁴⁰⁹ In the case of an offence the sentence for which falls to be imposed under subsection (2) of section 110 or 111 of the *Sentencing Act*, nothing in that subsection prevents the court, after taking into account any matter referred to in subsection (1) of this section, from imposing any sentence which is not less than 80 per cent of that specified in that subsection.⁴¹⁰

1.217 In addition it refers to certain aggravating factors such as racial or religious aggravation⁴¹¹ and aggravation related to disability or sexual orientation.⁴¹²

1.218 It outlines restrictions on community sentences;⁴¹³ restrictions on discretionary custodial sentences;⁴¹⁴ procedural requirements for imposing community sentences and discretionary custodial sentences;⁴¹⁵ fines;⁴¹⁶ community orders;⁴¹⁷ prison sentences of less than 12 months;⁴¹⁸ intermittent custody;⁴¹⁹ custody plus orders;⁴²⁰ suspended sentences;⁴²¹ electronic monitoring;⁴²² dangerous offenders;⁴²³ effect of remand in custody or on bail;⁴²⁴ release on licence;⁴²⁵ consecutive or concurrent terms;⁴²⁶ effect of life sentence;⁴²⁷ deferment of sentence;⁴²⁸ drug treatment;⁴²⁹ alteration of penalties for

⁴⁰⁶ Section 143(2) of the *Criminal Justice Act 2003*.

⁴⁰⁷ Section 143(3) of the *Criminal Justice Act 2003*.

⁴⁰⁸ Section 144 of the *Criminal Justice Act 2003*.

⁴⁰⁹ Section 144(1) of the *Criminal Justice Act 2003*.

⁴¹⁰ Section 144(2) of the *Criminal Justice Act 2003*.

⁴¹¹ Section 145 of the *Criminal Justice Act 2003*.

⁴¹² Section 146 of the *Criminal Justice Act 2003*.

⁴¹³ Section 147 to section 151 of the *Criminal Justice Act 2003*.

⁴¹⁴ Section 152 to section 155 of the *Criminal Justice Act 2003*.

⁴¹⁵ Section 156 to section 160 of the *Criminal Justice Act 2003*.

⁴¹⁶ Section 162 to section 165 of the *Criminal Justice Act 2003*.

⁴¹⁷ Section 177 to section 180 of the *Criminal Justice Act 2003*.

⁴¹⁸ Section 181 to section 182 of the *Criminal Justice Act 2003*.

⁴¹⁹ Section 183 to section 186 of the *Criminal Justice Act 2003*.

⁴²⁰ Section 187 to section 186 of the *Criminal Justice Act 2003*.

⁴²¹ Section 189 to section 194 of the *Criminal Justice Act 2003*.

⁴²² Section 215 of the *Criminal Justice Act 2003*.

⁴²³ Section 224 to section 236 of the *Criminal Justice Act 2003*.

⁴²⁴ Section 240 to section 243 of the *Criminal Justice Act 2003*.

⁴²⁵ Section 244 to section 256A of the *Criminal Justice Act 2003*.

⁴²⁶ Section 263 to section 265 of the *Criminal Justice Act 2003*.

⁴²⁷ Chapter 7 of the *Criminal Justice Act 2003*.

⁴²⁸ Section 278 of the *Criminal Justice Act 2003*.

⁴²⁹ Section 279 of the *Criminal Justice Act 2003*.

offences;⁴³⁰ minimum sentence for certain firearms offences;⁴³¹ offenders transferred to mental hospital;⁴³² disqualification from working with children.⁴³³

(2) Australia

(a) New South Wales

1.219 Section 3A of the *Crimes (Sentencing Procedure) Act 1999* sets out the purposes of sentencing, namely, punishment; deterrence; protection of the community; rehabilitation; accountability; denunciation; and recognition of the harm done to the victim of the crime and the community. Part 2 sets out the penalties that may be imposed, namely, custodial sentences, non-custodial alternatives, fines, and restriction orders. In addition to setting out the general sentencing procedures, the Act also sets out the sentencing procedure for imprisonment, intensive correction orders, home detention orders, community service orders, good behaviour orders, restriction orders and intervention programme orders.⁴³⁴

(b) Northern Territory

1.220 Part 2 of the *Sentencing Act* sets out some general principles. Section 5 establishes some sentencing guidelines. These include the purposes of sentencing, namely, punishment, rehabilitation, deterrence, denunciation, and protection of the community;⁴³⁵ and several matters to which a sentencing court must have regard, including, the maximum and any minimum penalty prescribed for the offence, and the nature and severity of the offence.⁴³⁶ Section 6 sets out the factors to be considered in determining an offender's character while section 6A sets out the aggravating factors. Part 3 deals with non-custodial and custodial sentences. Part 4 deals with mental health orders. Part 5 deals with orders in addition to sentence, such as restitution and compensation orders, and restriction orders. Part 6 deals with the procedure for making of sentencing and other orders.

(c) Queensland

1.221 Part 2 of the *Penalties and Sentences Act 1992* sets out the governing principles of sentencing. Section 9 establishes sentencing guidelines. These include the purposes of sentencing, namely, punishment, rehabilitation, deterrence, denunciation, and protection of the community;⁴³⁷ and certain matters to which a sentencing court must have regard, including the principle that imprisonment should be a sentence of last resort, the maximum and minimum penalty prescribed for the offence, and the nature and severity of the offence.⁴³⁸ Among other matters, Part 2 also sets out the matters to be considered in determining the offender's character;⁴³⁹ and provides that a guilty plea⁴⁴⁰ and cooperation with law enforcement authorities⁴⁴¹ must be taken into account. Part 3 deals with releases, restitution and compensation. Part 3A deals with non-contact orders and Part 3A deals with banning orders. Part 4 deals with fines. Part 5 deals with intermediate orders such as probation orders and community service orders. Part 6 deals with intensive correction orders. Part 8 deals with orders of suspended

⁴³⁰ Section 280 to section 285 of the *Criminal Justice Act 2003*.

⁴³¹ Section 287 to section 293 of the *Criminal Justice Act 2003*.

⁴³² Section 294 to section 297 of the *Criminal Justice Act 2003*.

⁴³³ Section 298 of the *Criminal Justice Act 2003*.

⁴³⁴ Part 3 to Part 8C of the *Crimes (Sentencing Procedure) Act 1999*.

⁴³⁵ Section 5(1) of the *Sentencing Act*.

⁴³⁶ Section 5(2) to section 5(4) of the *Sentencing Act*.

⁴³⁷ Section 9(1) of the *Penalties and Sentences Act 1992*.

⁴³⁸ Section 9(2) to section 9(9) of the *Penalties and Sentences Act 1992*.

⁴³⁹ Section 11 of the *Penalties and Sentences Act 1992*.

⁴⁴⁰ Section 13 of the *Penalties and Sentences Act 1992*.

⁴⁴¹ Section 13A of the *Penalties and Sentences Act 1992*.

imprisonment and Part 9 deals with imprisonment. Part 9A deals with convictions for serious violent offences. Part 10 deals with indefinite sentences.

(d) South Australia

1.222 The *Criminal Law (Sentencing) Act 1988* provides some guidance in relation to sentencing. Part 2 sets out the general sentencing provisions. Division 1 of Part 2 sets out the procedural provisions. Division 3 sets out the general sentencing powers of the courts. Division 2A deals with serious repeat adult offenders and recidivist young offenders. Division 3 deals with sentences of indeterminate duration. Division 4 deals with sentencing guidelines. This provides that the Full Court may give a judgment establishing sentencing guidelines.⁴⁴² A sentencing court should have regard to relevant sentencing guidelines but is not bound to follow a particular guideline if, in the circumstances of the case, there are good reasons for not doing so. The Full Court may establish or review sentencing guidelines on its own initiative, or on application by the Director of Public Prosecutions, the Attorney General or the Legal Services Commission.⁴⁴³ Division 5 deals with sentencing standards for offences involving paedophilia. Part 3 deals with imprisonment, including non-parole periods and dangerous offenders. Part 4 deals with fines. Part 5 deals with bonds. Part 6 deals with community service and supervision. Part 7 deals with restitution and compensation. Part 9 deals with enforcement.

(e) Tasmania

1.223 The *Sentencing Act 1997* provides some guidance. Section 3 sets out the purposes of the Act. These are to amend and consolidate the State's sentencing law; promote the protection of the community as a primary consideration in sentencing offenders; promote consistency in sentencing offenders; establish fair procedures for imposing sentences on offenders generally, on offenders in special cases and dealing with offenders who breach the conditions of sentences; help prevent crime and promote respect for law by allowing courts to impose sentences aimed at deterring offenders and other persons from committing offences, the rehabilitation of offenders, and that denounce the conduct of offenders; promote public understanding of sentencing practices and procedures; set out the objectives of sentencing and related orders; and recognise the interests of victims of offences.

1.224 Part 2 deals with general sentencing powers. Part 3 deals with custodial sentences, including parole, dangerous criminals and suspended sentences. Part 3A deals with drug treatment orders. Part 4 deals with community service orders. Part 5 deals with probation orders. Part 6 deals with fines. Part 6A deals with rehabilitation programmes. Part 7 deals with driving disqualification orders. Part 8 deals with adjournments, discharges and dismissals. Part 9 deals with orders in addition to sentence including restitution, compensation and area restriction. Part 10 deals with assessment, continuing care, supervision and restriction orders. Part 11 deals with sentencing procedure.

1.225 In its 2008 Report on Sentencing,⁴⁴⁴ the Tasmania Law Reform Institute recommended that the *Sentencing Act 1997* include separate sections for the purposes of the Act and the purposes of sentencing.⁴⁴⁵ It also recommended that the purposes of sentencing should include punishment; deterrence; rehabilitation; protection of the community; denunciation; restoration of relations.⁴⁴⁶ The Institute had recommended the establishment of an independent statutory sentencing advisory council.⁴⁴⁷ It further recommended that guideline judgments should not be introduced in the absence of broad judicial and professional support for them from the legal profession.⁴⁴⁸

⁴⁴² Section 29A of the *Criminal Law (Sentencing) Act 1988*.

⁴⁴³ Section 29B of the *Criminal Law (Sentencing) Act 1988*.

⁴⁴⁴ *Sentencing Final Report No 11* (Tasmania Law Reform Institute, 2008).

⁴⁴⁵ *Ibid* at 85.

⁴⁴⁶ *Sentencing Final Report No 11* (Tasmania Law Reform Institute, 2008) at 88.

⁴⁴⁷ *Ibid* at 92.

⁴⁴⁸ *Ibid* at 95.

(f) Victoria

1.226 Part 2 of the *Sentencing Act 1991*, as amended, sets out the governing principles. Section 5 sets out sentencing guidelines. These include the purposes of sentencing, namely, punishment, deterrence, rehabilitation, denunciation, and protection of the community;⁴⁴⁹ and certain matters to which a sentencing court must have regard, including the maximum penalty prescribed for the offence, current sentencing practices, and the nature and gravity of the offence.⁴⁵⁰ Section 6 sets out the factors to be considered in determining an offender's character and section 6AAA provides for a sentence discount for a guilty plea. Part 2A deals with serious offenders. Part 2B deals with continuing criminal enterprise offenders. Part 3 deals with custodial and non-custodial sentences, including community service orders, fines, dismissals, discharges and adjournments, and special conditions for intellectually disabled offenders. Part 4 deals with orders in addition to sentence including restitution, compensation. Part 4A deals with identity crime certificates. Part 5 deals with mentally ill offenders. Part 6 deals with the procedure of making of sentencing and other orders.

(g) Western Australia

1.227 The *Sentencing Act 1995* provides some guidance. Part 2 deals with general matters. Section 6 sets out the principles of sentencing. Thus a sentence imposed on an offender must be commensurate with the seriousness of the offence. The seriousness of an offence must be determined by taking into account the statutory penalty for the offence; the circumstances of the offence, including the vulnerability of the victim; any aggravating factors; and any mitigating factors. This does not prevent the reduction of a sentence because of any mitigating factors or any rule of law as to the totality of sentences. A court must not impose a sentence of imprisonment on an offender unless it decides that the seriousness of the offence is such that only imprisonment can be justified or the protection of the community requires it. A sentencing court must take into account any relevant guidelines in a guideline judgment. Section 7 sets out aggravating factors and section 8 sets out mitigating factors. Part 3 deals with matters preliminary to sentencing. Part 3A deals with pre-sentence orders. Part 4 deals with the sentencing process. Part 5 deals with sentencing options. Part 6 deals with the release of an offender without sentence. Part 7 deals with conditional release orders. Part 8 deals with fines. Part 9 deals with community-based orders. Part 10 deals with intensive supervision orders. Part 11 deals with suspended imprisonment. Part 12 deals with conditional suspended imprisonment. Part 13 deals with imprisonment, including release. Part 14 deals with indefinite imprisonment. Part 15 deals with other forms of sentence including disqualification orders. Part 16 deals with reparation orders. Part 17 deals with other orders not forming part of a sentence.

(h) Commonwealth of Australia

1.228 There is no Sentencing Act at the federal level. Part IB (sentencing, imprisonment and release of federal offenders) of the *Crimes Act 1914* does, however, provide some guidance. Division 2 deals with general sentencing principles. Section 16A deals with the matters to which a sentencing court must have regard. Accordingly, the court must impose a sentence that is of a severity appropriate in all the circumstances of the offence. In addition, the court must take into account other matters including the nature and circumstances of the offence, the personal circumstances of the victim, any injury, loss or damage resulting from the offence; the degree to which the person has shown contrition for the offence; any guilty plea; any co-operation with law enforcement agencies; deterrence; punishment; character, antecedents, age, means and physical or mental condition of the person; prospect of rehabilitation. Division 3 deals with sentences of imprisonment. Division 4 deals with the fixing of non-parole periods and the making of recognisance release orders. Division 5 deals with conditional release on parole or licence. Division 8 deals with summary disposition and Division 9 deals with sentencing alternatives for persons suffering from mental illness or intellectual disability.

1.229 The Australian Law Council observed:

⁴⁴⁹ Section 5(1) of the *Sentencing Act 1991*.

⁴⁵⁰ Section 5(2) of the *Sentencing Act 1991*.

“Although these provisions provide some guidance to sentencing courts, State courts exercising federal jurisdiction must also apply their particular State and Territory procedures when determining the sentence to be imposed on a federal offender.”⁴⁵¹

As a result, differences arise in the way federal offenders are dealt with from one jurisdiction to another. In addition, the options available for sentencing federal offenders (ranging from fines and imprisonment to community service orders and home detention) vary across Australia.”⁴⁵²

1.230 In its 2006 Report,⁴⁵³ the Australian Law Reform Commission recommended that the Australian Parliament should enact a separate federal *Sentencing Act* that incorporated those provisions of the *Crimes Act 1914* that deal with the sentencing, administration and release of federal offenders. In addition, provisions currently located in Parts I (Preliminary), IA (General), IB, III (offences relating to the administration of justice) and VIIC (Pardons, quashed convictions and spent convictions) of the *Crimes Act* and in other federal legislation, that are relevant to the sentencing, administration and release of federal offenders should be consolidated in the new act.⁴⁵⁴ In addition, the Commission recommended that the federal sentencing legislation should set out the purposes of sentencing, namely, punishment, deterrence, rehabilitation, protection of the community, denunciation and restoration of relations between the community, the offender and the victim.⁴⁵⁵ Furthermore, the Commission recommended that the federal sentencing legislation should set out the principles of sentencing, namely, proportionality, parsimony, totality, consistency and parity, and individualised justice.⁴⁵⁶ The Commission also recommended that the federal sentencing legislation should set out sentencing factors such as those likely to aggravate or mitigate a sentence.⁴⁵⁷

(3) New Zealand

1.231 Section 8 of the *Sentencing Act 2002*, as amended,⁴⁵⁸ sets out the purposes and principles of sentencing. The purposes of sentencing are to hold the offender accountable for harm done to the victim and the community; to promote in the offender a sense of responsibility for, and an acknowledgement of, that harm; to provide for the interests of the victim of the offence; to provide reparation for harm done;⁴⁵⁹ to denounce the conduct in which the offender was involved; to deter the offender or other persons from committing the same or a similar offence; to protect the community from the offender; and/or to assist in the offender’s rehabilitation and reintegration.⁴⁶⁰

1.232 The principles of sentencing oblige the court to take into account the gravity of the offending in the particular case, including the degree of culpability; to take into account the seriousness of the type of offence in comparison with other types of offences;⁴⁶¹ to impose the maximum penalty prescribed for the

⁴⁵¹ Section 68(2) of the *Judiciary Act 1903*.

⁴⁵² Australian Law Council <http://www.lawcouncil.asn.au/programs/criminal-law-human-rights/criminal-law/sentencing.cfm> (accessed 11.10.11).

⁴⁵³ *Same Crime, Same Time - Sentencing of Federal Offenders* Report 103 (Australian Law Reform Commission, 2006).

⁴⁵⁴ *Ibid* at 27.

⁴⁵⁵ *Ibid* at 29.

⁴⁵⁶ *Ibid* at 29-30.

⁴⁵⁷ *Ibid* at 30-32.

⁴⁵⁸ Section 6 of the *Sentencing (Amendment) Act 2007*.

⁴⁵⁹ Section 12 of the *Sentencing Act 2002*, as amended, creates a strong presumption in favour of reparation.

⁴⁶⁰ Section 7(1) of the *Sentencing Act 2002*, as amended. Section 7(2) provides that to avoid doubt, nothing about the order in which the purposes appear implies that any purpose referred to must be given greater weight than any other purpose referred to.

⁴⁶¹ As indicated by the maximum penalties prescribed for the offences.

offence if the offending is within the most serious of cases for which that penalty is prescribed;⁴⁶² to impose a penalty near to the maximum prescribed for the offence if the offending is near to the most serious of cases for which that penalty is prescribed;⁴⁶³ to take into account the general desirability of consistency with appropriate sentencing levels and other means of dealing with offenders, in respect of similar offenders committing similar offences in similar circumstances; to take into account any information provided to the court concerning the effect of the offending on the victim; to impose the least restrictive outcome that is appropriate in the circumstances; to take into account any particular circumstances of the offender that mean that a sentence or other means of dealing with the offender that would otherwise be appropriate would, in the particular instance, be disproportionately severe; to take into account the offender's personal, family, whanau, community and cultural background in imposing a sentence or other means of dealing with the offender with a partly or wholly rehabilitative purpose; and to take into account any outcomes of restorative justice processes that have occurred, or that the court is satisfied are likely to occur.⁴⁶⁴

1.233 The Act sets out the aggravating and mitigating factors.⁴⁶⁵ It also provides that the court must take into account any offer, response or measure to make amends.⁴⁶⁶

1.234 The Act sets out a hierarchy of sentences from the least to the most restrictive.⁴⁶⁷ These include discharges or orders to come up for sentence if called on; sentences of a fine and reparation; community-based sentences of community work and supervision; community-based sentences of intensive supervision and community detention; sentences of home detention; and sentences of imprisonment.

1.235 When considering the imposition of a sentence of imprisonment for any particular offence, the court must have regard to the desirability of keeping offenders in the community as far as that is practicable and consonant with the safety of the community.⁴⁶⁸ The court must not impose a sentence of imprisonment unless it is satisfied that: a sentence is being imposed for all or any of the purposes of sentencing; those purposes cannot be achieved by a sentence other than imprisonment; and no other sentence would be consistent with the application of the principles of sentencing.⁴⁶⁹ Nothing limits the discretion of the court to impose a sentence of imprisonment on an offender if the court is satisfied on reasonable grounds that the offender is unlikely to comply with any other sentence that it could lawfully impose and that would otherwise be appropriate.⁴⁷⁰

1.236 When sentencing an offender, a court *must* impose a sentence that is consistent with any sentencing guidelines that are relevant in the offender's case, *unless* the court is satisfied that it would be contrary to the interests of justice to do so.⁴⁷¹ Furthermore, if sentencing guidelines indicate that a

⁴⁶² Unless circumstances relating to the offender make that inappropriate.

⁴⁶³ Unless circumstances relating to the offender make that inappropriate.

⁴⁶⁴ Section 8 of the *Sentencing Act 2002*, as amended.

⁴⁶⁵ Section 9 and section 9A the *Sentencing Act 2002*, as amended.

⁴⁶⁶ Section 10 of the *Sentencing Act 2002*, as amended.

⁴⁶⁷ Section 10A of the *Sentencing Act 2002*, as amended. Sections 19 to section 21 provide guidance on permitted combinations of sentences. Section 22 to section 23 restrict the use of cumulative sentences. Part 2 sets out the procedure relating to the various sentences. Section 86A-I provides for additional consequences for repeated serious violent offending. Section 87 to section 90 deal with preventive detention

⁴⁶⁸ Section 16(1) of the *Sentencing Act 2002*, as amended.

⁴⁶⁹ Section 16(2) of the *Sentencing Act 2002*, as amended. Section 16(3) provides that section 16 is subject to any provision in this or any other enactment that (a) provides a presumption in favour of or against imposing a sentence of imprisonment in relation to a particular offence; or (b) requires a court to impose a sentence of imprisonment in relation to a particular offence.

⁴⁷⁰ Section 17 of the *Sentencing Act 2002*, as amended.

⁴⁷¹ Section 21A of the *Sentencing Act 2002*, as amended.

sentence of a particular kind, or within a particular range, would normally be appropriate for the offence, a court must give reasons for deciding on a sentence of a different kind or outside that range.⁴⁷²

(4) Canada

1.237 The *Canadian Criminal Code*, aside from prescribing mandatory penalties for certain offences,⁴⁷³ sets out the purposes and principles of sentencing.⁴⁷⁴ Accordingly, the fundamental purpose of sentencing is to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives: to denounce unlawful conduct; to deter the offender and other persons from committing offences; to separate offenders from society, where necessary; to assist in rehabilitating offenders; to provide reparations for harm done to victims or to the community; and/or to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.⁴⁷⁵

1.238 The fundamental principle is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.⁴⁷⁶ In addition, the courts must take into consideration the following principles: a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender; a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; where consecutive sentences are imposed, the combined sentence should not be unduly long or harsh; an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders.⁴⁷⁷

1.239 The *Criminal Code* also deals with the use of alternative measures;⁴⁷⁸ sentencing of organisations;⁴⁷⁹ punishment generally;⁴⁸⁰ absolute and conditional discharges;⁴⁸¹ probation;⁴⁸² fines and forfeiture;⁴⁸³ restitution;⁴⁸⁴ conditional sentences of imprisonment;⁴⁸⁵ imprisonment;⁴⁸⁶ eligibility for parole;⁴⁸⁷ imprisonment for life;⁴⁸⁸ and pardons and remissions.⁴⁸⁹

⁴⁷² Section 31(1A) of the *Sentencing Act 2002*, as amended.

⁴⁷³ See Chapter 2.

⁴⁷⁴ Part XXIII of the *Canadian Criminal Code*.

⁴⁷⁵ Section 718 of the *Canadian Criminal Code*. However, section 718.01 provides that when a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of *denunciation and deterrence* of such conduct. Similarly, section 718.02 provides that when a court imposes a sentence for an offence under subsection 270(1), section 270.01 or 270.02 or paragraph 423.1(1)(b), the court shall give primary consideration to the objectives of denunciation and deterrence of the conduct that forms the basis of the offence.

⁴⁷⁶ Section 718.1 of the *Canadian Criminal Code*.

⁴⁷⁷ Section 718.2 of the *Canadian Criminal Code*.

⁴⁷⁸ Section 717 of the *Canadian Criminal Code*.

⁴⁷⁹ Section 718.21 of the *Canadian Criminal Code*.

⁴⁸⁰ Section 718.3 of the *Canadian Criminal Code*.

⁴⁸¹ Section 730 of the *Canadian Criminal Code*.

⁴⁸² Section 731 of the *Canadian Criminal Code*.

⁴⁸³ Section 734 of the *Canadian Criminal Code*.

⁴⁸⁴ Section 738 of the *Canadian Criminal Code*.

⁴⁸⁵ Section 742 of the *Canadian Criminal Code*.

⁴⁸⁶ Section 743 of the *Canadian Criminal Code*.

⁴⁸⁷ Section 743.6 of the *Canadian Criminal Code*.

1.240 In addition, the *Youth Criminal Justice Act 2002* sets out the purposes and principles relevant to the sentencing of young offenders.⁴⁹⁰ Accordingly, the purpose of youth sentencing is to hold a young person accountable for an offence through the imposition of just sanctions that have meaningful consequences for the young person and that promote his or her rehabilitation and reintegration into society, thereby contributing to the long term protection of the public.⁴⁹¹

1.241 A youth justice court determines the sentence in accordance with the following principles: the sentence must not result in a punishment that is greater than the punishment that would be appropriate for an adult who has been convicted of the same offence committed in similar circumstances; the sentence must be similar to the sentences imposed in the region on similar young persons found guilty of the same offence committed in similar circumstances; the sentence must be proportionate to the seriousness of the offence and the degree of responsibility of the young person for that offence; all available sanctions other than custody that are reasonable to in the circumstances should be considered for all young persons; and the sentence must be the least restrictive sentence that is capable of achieving the purpose of youth sentences, be one that is most likely to rehabilitate the young person and reintegrate him or her into society, and promote a sense of responsibility in the young person, and an acknowledgement of the harm done to victims and the community.⁴⁹²

1.242 The youth court must also consider the following factors: the degree of participation by the young person in the commission of the offence; the harm done to victims and whether it was intentional or reasonably foreseeable; any reparation made by the young person to the victim in the community; the time spent in detention by the young person as a result of the offence; the previous findings of guilt of the young person; and any other aggravating and mitigating circumstances related to the young person or the offence that are relevant to the purpose and principles of youth sentencing.⁴⁹³

1.243 A youth justice court must not commit a young person to custody unless: the young person has committed a violent offence; the young person has failed to comply with non-custodial sentences; the young person has committed an indictable offence for which an adult would be liable to imprisonment for a term of more than two years and has a history that indicates a pattern of findings of guilt; or in exceptional cases where the young person has committed an indictable offence, the aggravating circumstances of the offence are such that the imposition of a non-custodial sentence would be inconsistent with the purposes and principles of youth sentences.⁴⁹⁴ Even if one or more of these circumstances apply, a youth justice court must not impose a custodial sentence unless the court has considered all alternatives to custody that are reasonable in the circumstances and determined that there is not a reasonable alternative, or combination of alternatives, that is in accordance with the purpose and principles of youth sentences.⁴⁹⁵ In this regard, the court must consider: the alternatives to custody that are available; the likelihood that the young person will comply with a non-custodial sentence, taking into account his or her compliance with previous non-custodial sentences; and the alternatives to custody that have been used in respect of young persons for similar offences committed in similar circumstances.⁴⁹⁶ If a youth justice court imposes a youth sentence that includes a custodial portion, the court must state the reasons why it has determined that a non-custodial sentence is not adequate to achieve the purpose of youth sentencing.⁴⁹⁷

⁴⁸⁸ Section 745 of the *Canadian Criminal Code*.

⁴⁸⁹ Section 748 of the *Canadian Criminal Code*.

⁴⁹⁰ Part 4 of the *Youth Criminal Justice Act 2002*.

⁴⁹¹ Section 38(1) of the *Youth Criminal Justice Act 2002*.

⁴⁹² Section 38(2) of the *Youth Criminal Justice Act 2002*.

⁴⁹³ Section 38(3) of the *Youth Criminal Justice Act 2002*.

⁴⁹⁴ Section 39(1) of the *Youth Criminal Justice Act 2002*.

⁴⁹⁵ Section 39(2) of the *Youth Criminal Justice Act 2002*.

⁴⁹⁶ Section 39(3) of the *Youth Criminal Justice Act 2002*.

⁴⁹⁷ Section 39(9) of the *Youth Criminal Justice Act 2002*.

G Conclusions and the Commission's General Approach

1.244 In this Chapter, the Commission has considered the general aims of criminal sanctions as well as the principles of sentencing in order to provide a conceptual framework for the analysis of the different forms of mandatory sentences that will be reviewed in detail in Chapters 2 to 4. In this regard, the Commission identified four main aims of criminal sanctions, namely (a) punishment, (b) deterrence, (c) reform and rehabilitation and (d) reparation. The Commission also identified three key principles of sentencing, namely (a) the humanitarian principle (which incorporates respect for constitutional and international human rights), (b) the justice principle (including proportionality) and (c) the economic principle.

1.245 The Commission notes that the justice principle is of particular importance because it incorporates the concept of proportionality, which requires an individualised approach to sentencing, namely, that the sentencing court must have regard to the circumstances of both the offence and the offender. In this context, the Commission fully appreciates (based on the review of the relevant case law in this Chapter) that the Supreme Court and the Court of Criminal Appeal have developed general guidance, and in some instances specific guidelines, such as the strong presumption of a custodial sentence on conviction for manslaughter and rape. These are clearly intended to provide principle-based clarity around likely sentencing outcomes, and reflect comparable developments in many other jurisdictions. The Commission notes the importance of such guidance and guidelines, bearing in mind that the Oireachtas has provided for a very wide discretion as to the actual sentence to be imposed for the majority of criminal offences, including some of the most serious offences, such as manslaughter and rape, for which the sentence can range from no custodial sentence to a maximum of life imprisonment.

1.246 The Commission has also discussed in the Chapter the extensive case law in Ireland which indicates that sentencing courts are also conscious of the need to consider a wide range of aggravating factors, and mitigating factors, as well as the individual circumstances of the offender, which directly affect both the seriousness of the offence and the severity of the sentence to be imposed in an individual case. The Commission notes that this has built on the list of aggravating factors and mitigating factors, and the individual circumstances of the offender, set out in the Commission's 1996 *Report on Sentencing*.⁴⁹⁸ It is, equally, clear that the courts have also had regard to comparable case law and developments in other jurisdictions since 1996 in connection with the ongoing development of such factors.

1.247 The Commission also notes, however, that in spite of the development and recognition of the general aims of criminal sanctions and principles of sentencing, there remain some deficiencies in the sentencing system in Ireland. The Commission has discussed the recommendations made in 2000, and reiterated in 2011, that sentencing guidance and guidelines should be developed in an even more structured manner by the proposed Judicial Council. The Commission fully supports those recommendations, and notes that such guidance and guidelines could build on the framework provided by the general aims of criminal sanctions, as well as the principles of sentencing, discussed in this Chapter. They would also have the benefit of the guidance and guidelines available from decisions of the Supreme Court and the Court of Criminal Appeal, including those discussed in this Chapter. Such guidance could also build on the growing importance of the Irish Sentencing Information System (ISIS) which, as already discussed, has the potential to provide a significant database of sentencing information for the courts. In this respect, the Commission agrees with the view that ISIS, which has been developed using experience with comparable databases from other jurisdictions (as discussed in this Chapter), could in time be regarded as a leading model of its type.⁴⁹⁹

1.248 In conclusion, therefore, the Commission supports the recommendations made in 2000, and reiterated in 2011, that the proposed Judicial Council be empowered to develop and publish suitable guidance or guidelines on sentencing which would reflect the general aims of criminal sanctions and the principles of sentencing discussed in this Consultation Paper. The Commission has also concluded, and

⁴⁹⁸ Law Reform Commission *Report on Sentencing* (LRC 53-1996).

⁴⁹⁹ See, generally, O'Malley, *Sentencing: Towards a Coherent System* (Thomson Reuters, 2011), and O'Malley "Creativity and Principled Discretion over Sentencing a Necessity", *The Irish Times*, 19 December 2011.

provisionally recommends, that such guidance or guidelines should have regard to: the sentencing guidance and guidelines available from decisions of the Supreme Court and the Court of Criminal Appeal, including those discussed in this Consultation Paper; the aggravating and mitigating factors, and individual offender characteristics, identified in the Commission's 1996 *Report on Sentencing*, as developed by the courts since 1996; and information in relevant databases, notably the Irish Sentencing Information System (ISIS).

1.249 The Commission supports the recommendations made in 2000, and reiterated in 2011, that the proposed Judicial Council be empowered to develop and publish suitable guidance or guidelines on sentencing which would reflect the general aims of criminal sanctions and the principles of sentencing discussed in this Consultation Paper. The Commission also provisionally recommends that such guidance or guidelines should have regard to: the sentencing guidance and guidelines available from decisions of the Supreme Court and the Court of Criminal Appeal, including those discussed in this Consultation Paper; the aggravating and mitigating factors, and individual offender characteristics, identified in the Commission's 1996 Report on Sentencing, as developed by the courts since 1996; and information in relevant databases, notably the Irish Sentencing Information System (ISIS).

1.250 In Chapters 2 to 4, the Commission employs the general aims and principles discussed here, and the approach expressed in the preceding paragraphs, in order to review whether the mandatory sentences discussed in those chapters are, in accordance with the Attorney General's request, "appropriate or beneficial."

CHAPTER 2 ENTIRELY MANDATORY SENTENCES

A Introduction

2.01 In this Chapter the Commission considers the first type of mandatory sentence identified in the Introduction, entirely mandatory sentences, of which there are only two examples in Ireland. These are the mandatory life sentence for (a) murder¹ and (b) murder of designated persons such as a member of the Garda Síochána.² As the Commission notes, these entirely mandatory sentences are reserved for offences which formerly attracted the death penalty.

B Abolition of the Death Penalty

2.02 While the death penalty had been progressively abolished throughout the first half of the 19th century,³ section 2 of the *Offences Against the Person Act 1861* retained it as the penalty for murder.⁴ Section 2 provided that “Upon every Conviction for Murder the Court shall pronounce the Sentence of Death”. In theory, the provision applied to all persons who had reached the age of 17 years and been convicted of murder. In reality, however, the death penalty was commuted to imprisonment or some other form of detention in many cases.

2.03 From the 1930s onwards, disquiet regarding the existence of the death penalty became evident and pressure to remove it from the statute book grew. It is clear, however, that the Constitution of 1937 envisaged its retention, as it vested the power to commute a sentence in the President, subject to the advice and consent of the Government.⁵ In 1951 Sean MacBride tabled a motion in the Dáil, proposing that a Select Committee be appointed to examine the desirability of abolishing the death penalty. In 1956 Professor Stanford proposed in the Seanad that the Government consider abolishing the death penalty or suspending it for a trial period. On both occasions the standard abolitionist arguments were advanced: the inhumanity of execution, the lack of firm evidence as to its deterrent effect and the possibility of error. The last execution in Ireland was of Michael Manning and took place on 20th April 1954, in Mountjoy Prison. No woman had been executed since 1925.

2.04 *The Criminal Justice Act 1964* abolished the death penalty for all crimes except treason, “capital murder”, and certain offences subject to military law.⁶ Capital murder consisted of (i) murder of a member of the Garda Síochána acting in the course of his duty; (ii) murder of a prison officer acting in the course of his duty; (iii) murder done in the course or furtherance of an offence under section 6, 7, 8 or 9 of the *Offences Against the State Act 1939* or in the course or furtherance of the activities of an unlawful organisation within the meaning of section 18 (other than paragraph (f)) of that Act; and (iv) murder, committed within the State for a political motive, of the head of a foreign State or of a member of the government of, or a diplomatic officer of, a foreign State. In respect of non-capital murder, the *Criminal Justice Act 1964* imposed a mandatory sentence of penal servitude for life.

¹ Section 2 of the *Criminal Justice Act 1990*.

² Section 3 and section 4 of the *Criminal Justice Act 1990*.

³ See O'Malley “Sentencing Murderers: The Case for Relocating Discretion” (1995) 5(1) ICLJ 31 at 32 ff for a comprehensive account.

⁴ When the Irish Free State came into existence in 1922, the *Offences Against the Person Act 1861* was carried into Irish law by Article 73 of the Constitution. The death penalty also applied to the crimes of treason, section 1(1) of the *Treason Act 1939*, and piracy, section 3 of the *Piracy Act 1837*.

⁵ Article 13.6 of the Constitution.

⁶ Sections 124, 125, 127 and 128 of the *Defence Act 1954*.

2.05 Section 1 of the *Criminal Justice Act 1990* abolished the death penalty for all crimes. In 2001 the Constitution was amended at Article 15.5.2 to impose a constitutional ban on the death penalty.⁷ O'Malley observes that the enactment of the 1990 Act "was widely viewed as having brought the debate on sentencing for murder to a satisfactory conclusion".⁸ However, it was inevitable in some ways that there would be some public disquiet surrounding the fact that the penalty for murder would no longer be equal to the offence in fact or, as will be discussed below, in effect. As Hardiman J noted in *People (DPP) v Kelly*,⁹ a case involving manslaughter:

"In cases where there has been a death and especially a death caused by an intentional as opposed to a negligent act, unhappiness with the sentence is often expressed in the reflection that even the longest sentence will end at some point, probably while the defendant is still quite young, whereas the suffering and deprivation of the deceased person's family will be permanent. This is very sadly true. But it ignores the fact that under our present sentencing regime, sentences must be proportionate not only to the crime but to the individual offender."¹⁰ [Emphasis added]

C Section 2, Criminal Justice Act 1990

2.06 Section 2 of the *Criminal Justice Act 1990* replaced the death penalty for murder with a mandatory life sentence. While the abolition of the death penalty is to be lauded, it has been observed that the mandatory life sentence is not without its difficulties. The fact that "life" does not mean that an offender will spend the rest of his or her natural days behind bars has been highlighted as a major source of confusion. In addition, the constitutionality of section 2, as well as its compatibility with the *European Convention of Human Rights*, has recently been challenged before the Supreme Court. Each of these aspects will now be considered in greater detail.

(1) The Meaning of "Life"

2.07 It has been noted that a "life sentence is not to be taken literally". O'Malley observes that most life sentence prisoners are released after serving a certain number of years and that this has been the practice for a long time.¹¹ In 2010, for instance, the Minister for Justice, Equality and Law Reform indicated that during the period 2004 to 2010 the average time spent in custody by life sentence prisoners was 17 years.¹² He further observed that:

"This compares to an average of just over 7 ½ years for releases dating from 1975 to 1984, just under 12 years for the period dating from 1985 to 1994 and just under 14 years for the period dating from 1995 to 2004. As is clear from these figures life sentence prisoners are serving longer terms in custody."¹³

⁷ Article 15.5.2 provides: "The Oireachtas shall not enact any law providing for the imposition of the death penalty."

⁸ O'Malley "Sentencing Murderers: The Case for Relocating Discretion" (1995) 5(1) ICLJ 31. In its *Report on Sentencing* (LRC 53-1996), at Recommendation 12, and its *Report on Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008), at paragraph 1.67, the Law Reform Commission recommended the abolition of the mandatory life sentence for murder.

⁹ *People (DPP) v Kelly* [2005] 1 ILRM 19.

¹⁰ *People (DPP) v Kelly* [2005] 1 ILRM 19, 29-30. Hardiman J cites *State (Healy) v Donoghue* [1976] IR 325; *People (Attorney General) v O'Driscoll* (1972) 1 Frewen 351; and *People (DPP) v M* [1994] 3 IR 306 in relation to rehabilitation.

¹¹ O'Malley "Sentencing Murderers: The Case for Relocating Discretion" (1995) 5(1) ICLJ 31 at 34.

¹² Dáil Debates, Written Answers - Crime Levels, Vol. 707 No. 5, Thursday, 29th April 2010, Mr Ahern, paragraph 170.

¹³ Dáil Debates, Written Answers - Crime Levels, Vol. 707 No. 5, Thursday, 29th April 2010, Mr Ahern, paragraph 170.

Thus, while the life sentence prisoner might anticipate release from detention at some stage during his or her life, he or she will likely serve a lengthy sentence before that occurs.

2.08 The reason why a life sentence should not mean life behind bars is that the Executive has at its disposal a number of means of granting early release. O'Malley observes that there are three types of early release, namely, special remission, standard remission and temporary release.¹⁴

2.09 The power to grant "special remission" is the power to commute or remit *any* sentence. This power is vested in the Executive by Article 13.6 of the Constitution and section 23 of the *Criminal Justice Act 1951*,¹⁵ as amended.¹⁶ O'Malley describes this as an equivalent to the royal prerogative of mercy.¹⁷ Special remission may be granted at any time at the discretion of the Executive and prisoners have no legal entitlement to it.¹⁸ It would appear that the effect of special remission is that the offender is no longer subject to punishment for the offence in respect of which he or she was serving the sentence.¹⁹

2.10 "Standard remission", on the other hand, is the entitlement of prisoners, *excluding prisoners serving life sentences*,²⁰ under the *Prison Rules* to earn remission of up to one-fourth of their sentence for good behaviour.²¹ As with special remission, the effect of standard remission is that the offender is no longer subject to punishment for the offence in respect of which he or she was serving the sentence.²²

2.11 The power to grant "temporary release" is vested in the Executive by section 2 of the *Criminal Justice Act 1960*,²³ as amended.²⁴ It is a discretionary power which may be exercised in favour of

¹⁴ O'Malley "The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland" (Paper delivered at Fitzwilliam College, Cambridge, June 2008 and published in Padfield, van Zyl Smith and Dunkel (eds) *Release from Prison: European Policy and Practice* (Willan Publishing, UK, January 2010)) at 3.

¹⁵ Section 23(1) of the *Criminal Justice Act 1951*: Except in capital cases, the Government may commute or remit, in whole or in part, any punishment imposed by a Court exercising criminal jurisdiction, subject to such conditions as they may think proper... Howard argues that the frequent exercise of clemency by the executive is a virtually certain consequence of the imposition of mandatory sentences.

¹⁶ Section 23(1) of the *Criminal Justice Act 1951* was amended by section 9 of the *Criminal Justice Act 1990* which deleted the words "except in capital cases" thereby extending the Government's right to commute or remit a prisoner's sentence in any type of case.

¹⁷ O'Malley "The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland" (Paper delivered at Fitzwilliam College, Cambridge, June 2008 and published in Padfield, van Zyl Smith and Dunkel (eds) *Release from Prison: European Policy and Practice* (Willan Publishing, UK, January 2010)) at 3.

¹⁸ O'Malley "The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland" (Paper delivered at Fitzwilliam College, Cambridge, June 2008 and published in Padfield, van Zyl Smith and Dunkel (eds) *Release from Prison: European Policy and Practice* (Willan Publishing, UK, January 2010)) at 8.

¹⁹ *Re Royal Prerogative of Mercy upon Deportation Proceedings* [1933] SCR 269 and *R v Veregin* [1933] 2 DLR 362; O'Malley "The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland" (Paper delivered at Fitzwilliam College, Cambridge, June 2008 and published in Padfield, van Zyl Smith and Dunkel (eds) *Release from Prison: European Policy and Practice* (Willan Publishing, UK, January 2010)) at 5 and 8.

²⁰ Rule 59(3) of the *Prison Rules 2007*. The *Criminal Justice (Miscellaneous Provisions) Act 1997* and the *Prisons Act 2007* empower the Minister for Justice to make rules for the regulation and good government of prisons. Section 35(2)(f) of the *Prisons Act 2007* provides that such rules may provide for remission.

²¹ Rule 38(1) of the *Prison Rules 1947* provides that a convicted prisoner sentenced to imprisonment for one month or more is entitled to remission of up to one fourth of his or her sentence for good behaviour. The *Prison Rules 1947* were made under the authority of the *Prisons (Ireland) Act 1907*.

²² O'Malley "The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland" (Paper delivered at Fitzwilliam College, Cambridge, June 2008 and published in Padfield, van Zyl Smith and Dunkel (eds) *Release from Prison: European Policy and Practice* (Willan Publishing, UK, January 2010)) at 7.

²³ Section 2 of the *Criminal Justice Act 1960*: The Minister may make rules providing for the temporary release, subject to such conditions (if any) as may be imposed in each particular case, of persons serving a sentence of penal servitude or imprisonment, or of detention in Saint Patrick's Institution.

prisoners at any time before they qualify for standard remission and prisoners serving life sentences. Although it was originally envisaged that temporary release should be granted for short periods for compassionate reasons or to facilitate integration,²⁵ O'Malley observes that the grant of temporary release came to function as an early release mechanism for those serving life sentences. Prisoners serving life sentences who are granted temporary release are released for a certain number of years and, unless they commit further offences or breach their release conditions, they can expect to remain at large indefinitely.²⁶

2.12 There is thus an important distinction to be drawn between early release prisoners who were serving life sentences and early release prisoners who were serving determinate sentences. As noted at paragraphs 2.08 to 2.11, prisoners serving life sentences are eligible for consideration under two of the early release mechanisms: special remission, which causes the sentence to expire, and temporary release, which, in effect, suspends the sentence. More often than not, however, such prisoners are considered under the temporary release mechanism. They are thus subject to recall at any stage of their natural lives should they commit any further offence or breach the conditions of their release. By contrast, prisoners serving determinate sentences are eligible for consideration under the three early release mechanisms: special remission, standard remission and temporary release. More often than not such prisoners are considered under the standard remission mechanism which causes the sentence to expire. Early release prisoners who had been serving determinate sentences are thus free from recall.

2.13 In 2001, the Minister for Justice, Equality and Law Reform established the non-statutory Parole Board to review the cases of prisoners serving long-term sentences and to provide advice in relation to the administration of those sentences.²⁷ The Parole Board can only review cases which have been referred to it by the Minister and, in principle, concern prisoners serving sentences of 8 years or more. Usually cases are reviewed at the half-way stage of the sentence or after 7 years, whichever comes first.²⁸ Prisoners convicted of certain offences, such as treason, murder contrary to section 3 of the *Criminal Justice Act 1990* or certain drugs offences,²⁹ may not participate in the process. However, persons convicted of "ordinary" murder may. When formulating its recommendations, the Parole Board is primarily concerned with the risk to members of the community which the release of a prisoner might pose. Factors which the Parole Board takes into account include:

- Nature and gravity of the offence;
- Sentence being served and *any recommendations by the judge*; [Emphasis added]
- Period of the sentence served at the time of the review;
- Threat to safety of members of the community from release;

²⁴ Section 2 of the *Criminal Justice Act 1960* was amended by section 1 of the *Criminal Justice (Temporary Release of Prisoners) Act 2003*, which sets out the matters that the Minister should consider before granting temporary release. Section 2 of the 1960 Act was also amended by section 110 of the *Criminal Justice Act 2006* but the terms of this amendment are not significant to this discussion.

²⁵ O'Malley "The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland" (Paper delivered at Fitzwilliam College, Cambridge, June 2008 and published in Padfield, van Zyl Smith and Dunkel (eds) *Release from Prison: European Policy and Practice* (Willan Publishing, UK, January 2010)) at 9.

²⁶ O'Malley "The Ends of Sentence: Imprisonment and Early Release Decisions in Ireland" (Paper delivered at Fitzwilliam College, Cambridge, June 2008 and published in Padfield, van Zyl Smith and Dunkel (eds) *Release from Prison: European Policy and Practice* (Willan Publishing, UK, January 2010)) at 10.

²⁷ *Annual Report 2009* (Parole Board, 2010) at page 11.

²⁸ See Address by Mr Michael McDowell TD, Minister for Justice, Equality and Law Reform, at the First Edward O'Donnell McDevitt Annual Symposium - "Sentencing in Ireland" 28 February 2004, in which the Minister indicated that he would not consider a case for early release unless 12 to 15 years had been served.

²⁹ These include treason and attempted treason; "capital murder" and attempted "capital murder"; possession of drugs contrary to section 27(3A) or section 27(3B) of the *Misuse of Drugs Act 1977*, as amended by section 5 of the *Criminal Justice Act 1999*.

- Risk of further offences being committed while on temporary release;
- Risk of prisoner failing to return to custody from any period of temporary release;
- Conduct while in custody;
- Extent of engagement with the therapeutic services and likelihood of period of temporary release enhancing reintegration prospects.

Thus the Parole Board considers the individual circumstances of each case before forming its recommendations

2.14 The factors considered by the Parole Board are broadly similar to the factors to which the Minister for Justice must have regard before giving a direction for temporary release.³⁰ It is particularly interesting to note that section 2(2)(b) of the *Criminal Justice Act 1960*, as amended,³¹ requires the Minister, before making an order for temporary release, to have regard to “the sentence of imprisonment concerned and *any recommendations of the court that imposed that sentence* in relation thereto.”³²

2.15 As noted at paragraph 2.06, the fact that “life” does not mean that an offender will spend the rest of his or her natural days behind bars has been a major source of confusion. This has repercussions in terms of how the public perceives the law to work and how offenders cope with the execution of their sentences. Without attempting to change the current system of imposing a mandatory life sentence for murder, the Commission observes that there are a number of ways in which the current system could be improved.

2.16 First, there is nothing to prevent a sentencing court from pronouncing in succinct terms the actual effect of a life sentence. Thus a court might sentence an offender “to imprisonment and to remain liable to imprisonment for his or her life” rather than “to life imprisonment”.³³ This would make clear that while the offender might not spend the rest of his or her days within the confines of a prison building, he or she could be recalled at any stage. No doubt this is the practice followed by many courts, nevertheless, the Commission is of the view that greater clarity would be provided if this was the practice followed by all courts.

2.17 Second, sentencing courts might be encouraged/required to indicate the relative seriousness of individual cases and recommend a minimum term that ought to be served before the offender became eligible for early release. As noted at paragraphs 2.13 and 2.14, the power of sentencing courts to make recommendations in respect of sentences has, to some extent, been recognised by the procedures of the Parole Board and the legislation concerning temporary release.³⁴ And, as will be observed in the Section D, the practice of requiring an offender to serve a minimum term has already been established by section 4 of the *Criminal Justice Act 1990*.

(2) Constitutionality of Section 2 of the Criminal Justice Act 1990

2.18 The constitutionality of section 2 of the *Criminal Justice Act 1990* was recently upheld by the Supreme Court in *Whelan and Another v Minister for Justice, Equality and Law Reform*.³⁵ The appellants argued that section 2 offended the *constitutional doctrine of the separation of powers* as it amounted to a sentencing exercise on the part of the Oireachtas in so far as it mandated that a life sentence be imposed for murder. In addition they argued that the imposition of a mandatory life sentence in every murder case

³⁰ Section 2 of the *Criminal Justice Act 1960*, as amended by section 1 of the *Criminal Justice (Temporary Release of Prisoners) Act 2003*.

³¹ Section 1 of the *Criminal Justice (Temporary Release of Prisoners) Act 2003*.

³² Section 2(2)(b) of the *Criminal Justice Act 1960*, as amended by section 1 of the *Criminal Justice (Temporary Release of Prisoners) Act 2003*.

³³ See *Report on the Penalties for Murder* (Lord Emslie Committee, 1972) at 96; and the *Report on the Penalty for Murder* (Criminal Law Revision Committee, 1973) at 19.

³⁴ *Criminal Justice Act 1960* as amended by the *Criminal Justice (Temporary Release of Prisoners) Act 2003*.

³⁵ [2007] IEHC 374; [2010] IESC 34.

offended the *constitutional principle of proportionality* as it deprived the trial judge of discretion as to the sentence to be imposed.

2.19 Addressing the *separation of powers* argument, the Supreme Court upheld the decision of the High Court that it was constitutionally permissible for the Oireachtas to specify the maximum, minimum or mandatory sentence to be imposed following conviction. Citing *Deaton v Attorney General*,³⁶ the Supreme Court ruled that:

“[T]he Oireachtas in the exercise of its legislative powers may choose in particular cases to impose a fixed or mandatory penalty for a particular offence. That is not to say that legislation which imposed a fixed penalty could not have its compatibility with the Constitution called in question if there was no *rational relationship* between the penalty and the requirements of justice with regard to the punishment of the offence specified.”³⁷ [Emphasis added]

2.20 Regarding the *proportionality* argument, the Supreme Court conceded that the crime of murder could be committed in a “myriad of circumstances” and that the “degree of blameworthiness [would] vary accordingly”. It, nevertheless, upheld the decision of the High Court that the Oireachtas was entitled to promote the respect for life by concluding that any murder, even at the lowest end of the scale, was so abhorrent and offensive to society that it merited a mandatory life sentence. In this regard, the Supreme Court observed that the “sanctity of human life and its protection [was] fundamental to the rule of law in any society”. Murder was thus a crime of profound and exceptional gravity:

“In committing the crime of murder the perpetrator deprives the victim, finally and irrevocably, of that most fundamental of rights, the right ‘to be’ and at the same time extinguishes the enjoyment of all other rights inherent in that person as a human being. By its very nature it has been regarded as the ultimate crime against society as a whole. It is also a crime which may have exceptional irrevocable consequences of a devastating nature for the family of the victim.”³⁸

2.21 As an alternative to the constitutionality argument, the appellants argued that section 2 of the 1990 Act should be given an interpretation that would accord with the Constitution. They asserted that such an interpretation would require the sentencing court to make a non-binding recommendation as to the minimum term to be served by the offender before he or she would become eligible for temporary release.

2.22 The Supreme Court rejected this argument to the extent that it was asserted that such an interpretation was required by the Constitution. However, it did not reject outright the potential benefits and possibility of introducing such a system:

“Whether the making of any such recommendation would have some advantages from a policy point of view is not obviously a matter for the Court but such a process would not change the existing position in principle.”³⁹

Thus while it might be outside the jurisdiction of the Supreme Court to introduce such a system, whereby the sentencing court would be encouraged/required to recommend a minimum term to be served by an offender convicted of murder, it would not, it seems, be outside the jurisdiction of the Oireachtas.

(3) Constitutionality of Temporary Release

2.23 In *Whelan and Another v Minister for Justice, Equality and Law Reform*⁴⁰ the appellants challenged the constitutionality of the Executive’s power to grant temporary release. They argued that the Minister’s power to grant temporary release to prisoners serving life sentences amounted to a sentencing exercise as it determined the actual length of imprisonment. This, they asserted, was incompatible with the *constitutional doctrine of the separation of powers*.

³⁶ [1963] IR 170.

³⁷ *Whelan and Another v Minister for Justice Equality and Law Reform* [2010] IESC 34.

³⁸ *Whelan and Another v Minister for Justice Equality and Law Reform* [2010] IESC 34.

³⁹ *Whelan and Another v Minister for Justice Equality and Law Reform* [2010] IESC 34.

⁴⁰ [2007] IEHC 374; [2010] IESC 34.

2.24 The Supreme Court upheld the decision of the High Court that the Minister's power to grant temporary release did not offend the Constitution. Citing a number of precedents, the Supreme Court confirmed that the power to grant temporary release rested exclusively with the Executive. It emphasised that the grant of temporary release was not an indication that the punitive part of the life sentence had been served. It was, instead, the grant of a privilege which was subject to conditions such as an obligation to keep the peace and observe the law. As the mandatory life sentence subsisted for life, temporary release could be terminated at any stage of the prisoner's life for good and sufficient reason such as a breach of the temporary release conditions. The Supreme Court thus concluded:

"In all these circumstances the Court does not consider that there is anything in the system of temporary release which affects the punitive nature or character of a life sentence imposed pursuant to s. 2. In particular a decision to grant discretionary temporary release does not constitute a termination let alone a determination of the sentence judicially imposed. Any release of a prisoner pursuant to the temporary release rules is, both in substance and form, the grant of a privilege in the exercise of an autonomous discretionary power vested in the executive exclusively in accordance with the constitutional doctrine of the separation of powers."⁴¹

2.25 In line with this judgment, the Commission observes that there would be less confusion regarding temporary release of offenders convicted of murder if the mandatory sentencing regime were made more transparent. As noted at paragraph 2.16, this could be achieved by encouraging/requiring sentencing courts to clarify that a life sentence does not necessarily mean that an offender will spend the rest of his or her days in the confines of a prison building but may be released, subject to recall, after he or she has served a certain period of time. Thus, from the moment the sentence is imposed, it is made clear to everyone - members of the public and offenders alike - how the mandatory life sentence is likely to operate.

(4) Compatibility with the European Convention on Human Rights

(a) Supreme Court Case Law

2.26 In *Whelan and Another v Minister for Justice, Equality and Law Reform*⁴² the appellants also sought a declaration⁴³ that the Irish system of imposing mandatory life sentences for murder was incompatible with the *European Convention on Human Rights* on three grounds.

2.27 Their first submission relied on Article 3 of the *European Convention on Human Rights*.⁴⁴ The appellants argued that section 2 of the 1990 Act was incompatible with Article 3 in so far as it imposed a mandatory life sentence for all convictions of murder. They further argued that they had been subjected to inhuman and degrading treatment in so far as they knew that they would probably be released at some point during their lives but had no way of assessing how or when that release would occur.

2.28 In response, the Supreme Court cited the European Court of Human Rights decision of *Kafkaris v Cyprus*⁴⁵ and observed that:

"(a) a mandatory life sentence imposed in accordance with law as punishment for an offence is not in itself prohibited by or incompatible with any Article of the Convention and,

(b) will not offend against Article 3 of the Convention 'when national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or conditional release of the prisoner' and,

(c) this requirement may be met even if that prospect of release is limited to the exercise of an executive discretion."⁴⁶

⁴¹ *Whelan and Another v Minister for Justice, Equality and Law Reform* [2010] IESC 34.

⁴² [2007] IEHC 374; [2010] IESC 34.

⁴³ Pursuant to section 5(1) of the *European Convention on Human Rights Act 2003*.

⁴⁴ Article 3: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

⁴⁵ (2009) 49 EHRR 35.

Since the Irish system of imposing mandatory life sentences carried with it a prospect of release in the form of an executive discretion, namely, temporary release, the Supreme Court dismissed the appellants' Article 3 submission.

2.29 The applicants' second submission relied on Article 5 of the *European Convention on Human Rights*. The appellants asserted that the role of the Parole Board and the exercise of the Minister of his power to commute or remit sentence or to direct the temporary release of prisoners serving mandatory life sentences was incompatible with Article 5(1)⁴⁷ and Article 5(4).⁴⁸ They argued that the manner in which the Minister, on the advice of the Parole Board, could grant temporary release amounted to a sentencing exercise on the part of the Executive contrary to Article 5(1). They further argued that they had been denied an appropriate mechanism to have their continued detention reviewed on a regular and frequent periodic basis in breach of Article 5(4).⁴⁹

2.30 Addressing the Article 5(1) submission, the Supreme Court reiterated that the power of the Minister to grant temporary release was an executive function rather than a sentencing exercise. The life sentence subsisted notwithstanding the grant of temporary release which was, in any case, subject to conditions. Thus the prisoner might be required to continue serving the life sentence if good and sufficient reasons, such as a breach of the temporary release conditions, were found to exist. Citing the European Court of Human Rights decision in *Kafkaris v Cyprus*⁵⁰ the Supreme Court observed that for detention to be lawful, Article 5(1) required that there be a causal connection between the conviction and the deprivation of liberty. In *Kafkaris*, the European Court had found that a causal connection existed between a conviction for murder and a mandatory life sentence which was wholly punitive.⁵¹ Such a connection would not exist where the punitive part of a life sentence - which was comprised of both a *punitive* part and a *preventative* part - had been served and the prisoner remained in custody under the preventative part. As life sentences in Ireland were wholly punitive, the Supreme Court ruled that a causal connection existed between a conviction for murder and the mandatory life sentence. The Supreme Court thus dismissed the appellants' Article 5(1) submission.

2.31 Regarding Article 5(4), the Supreme Court accepted that the European Court of Human Rights had ruled that in certain circumstances persons in custody and serving life sentences were entitled to regular reviews of their sentences by a court-like body. It observed, however, that much of the case law of the European Court of Human Rights related to the United Kingdom system of sentencing which was different to the Irish system. In the United Kingdom, life sentences contained two parts. The first part of the sentence - the *punitive or tariff* part - was fixed to reflect the punishment of the offender for the offence. The second part of the sentence - the *preventative* part - which was served after the first part had been served, was calculated having regard to the risk an offender might pose to the public if released. The European Court of Human Rights had held that under Article 5(4) a prisoner was entitled to have the preventative part of his or her detention regularly reviewed to assess whether he or she posed (or continued to pose) such a risk. As life sentences in Ireland were "wholly punitive", the Supreme Court held that Article 5(4) was not applicable to prisoners serving life sentences in Ireland. The Supreme Court thus dismissed the appellants' Article 5(4) submission.

⁴⁶ *Whelan and Another v Minister for Justice, Equality and Law Reform* [2010] IESC 34. See also *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraphs 98-99.

⁴⁷ Article 5(1): Everyone has the right to liberty and security of the person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

a. the lawful detention of a person after conviction by a competent court...

⁴⁸ Article 5(4): Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

⁴⁹ This echoes the view taken by the Irish Human Rights Commission in its *Report into the Determination of Life Sentences* (IHRC, 2006) at 3.

⁵⁰ (2009) 49 EHRR 35.

⁵¹ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 121.

2.32 The applicants' third submission relied on Article 6 of the *European Convention on Human Rights*. The appellants asserted that the role of the Parole Board and the process whereby the Minister considered the continued detention of an offender serving a mandatory life sentence contravened their rights under Article 6(1).⁵² They argued that such continued detention should only be decided by an independent judicial body which would conduct a hearing in public and at which hearing the plaintiffs would be afforded, *inter alia*, adversarial rights.

2.33 Regarding Article 6(1), the Supreme Court observed that no issue had been taken with the procedures before the trial court which had originally sentenced the appellants to life imprisonment. It stated that since the subsequent detention of the appellants was at all times referable to and a consequence of the punitive sentence so imposed no issue arose concerning the compatibility of section 2 of the *Criminal Justice Act 1990* with Article 6 of the *European Convention on Human Rights*. The Supreme Court thus dismissed the appellants' Article 6(1) submission.

2.34 Although the Supreme Court has ruled that mandatory sentencing in respect of murder is, in essence, compatible with the *European Convention on Human Rights*, the Commission notes that there a number of ways in which the regime might be improved. While the imposition of a mandatory life sentence carries with it a prospect of release in the form of an executive discretion, , the Commission observes that offenders serving life sentences have little way of knowing when they might expect to be released. While cases may be referred to the Parole Board for consideration after 7 years, a former Minister for Justice indicated that he would not consider cases for early release until at least 12 to 15 years had been served.⁵³ Thus it would be of benefit to the regime if sentencing courts were encouraged/required to recommend a minimum term to be served by the offender before he or she becomes eligible for release. In addition, the fact that the power to grant temporary release is an executive rather than a sentencing power gives rise to much confusion. Thus it would be of benefit to the regime if sentencing courts were encouraged/required to clarify that a life sentence will not necessarily result in an offender spending the rest of his or her life within the confines of a prison building.

(b) European Court of Human Rights Case Law

2.35 In light of the Supreme Court decision in *Whelan and Another v Minister for Justice, Equality and Law Reform*, it is worth considering a number of the cases which have come before the European Court of Human Rights.⁵⁴ These cases are primarily concerned with Article 5(1) and Article 5(4) of the *European Convention on Human Rights*. Two key principles regarding Article 5 have been extracted from the resultant jurisprudence:

“First, the underlying purpose of Article 5 is to protect individuals from being deprived of their liberty arbitrarily: in the context of life sentence prisoners a decision to continue their detention should not be taken arbitrarily. The required protection is achieved through the review mechanism prescribed by Article 5(4). Second, it may be inferred from the jurisprudence that prolonged detention can be justified on the limited grounds of *risk* and *dangerousness*.”⁵⁵ [Emphasis added].

2.36 It must be borne in mind, however, that many of these cases derive from applications concerning the United Kingdom's tariff system. It may be recalled that this system provides that a life sentence is composed of two parts: a punitive part and a preventative part. (This may be contrasted with the Irish sentencing system which considers life sentences to be wholly punitive). Once the punitive part

⁵² Article 6(1) of the *European Convention on Human Rights*: [I]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

⁵³ Address by Mr Michael McDowell TD, Minister for Justice, Equality and Law Reform at the First Edward O'Donnell McDevitt Annual Symposium - "Sentencing in Ireland" 28 February 2004.

⁵⁴ McCutcheon and Coffey "Life Sentences in Ireland and the European Convention on Human Rights (2006) *Irish Yearbook of International Law* 101.

⁵⁵ McCutcheon and Coffey "Life Sentences in Ireland and the European Convention on Human Rights (2006) *Irish Yearbook of International Law* 101 at 103.

of a sentence is served the continued detention of a prisoner under the preventative part can only be justified on the ground that the prisoner continues to represent a risk or danger to the public. Thus, while the *imposition* of a life sentence may be lawful under Article 5(1) the continued detention of a prisoner may become unlawful where the punitive part of the sentence has been served and the prisoner no longer represents a risk or danger to the public.

2.37 Thus the European Court of Human Rights established the principle that the continued detention of a prisoner under the preventative part of a life sentence must be periodically reviewed in accordance with Article 5(4) of the *European Convention on Human Rights*. In *Weeks v United Kingdom*⁵⁶ the applicant had received a discretionary life sentence for armed robbery on the ground that he was a dangerous offender. He had been subsequently released on licence which was revoked when he committed a further offence. The applicant contended that his detention subsequent to the revocation of his licence was contrary to Article 5(1) and that he had not been able to have his continued detention reviewed in accordance with Article 5(4).⁵⁷ The Court acknowledged that the freedom enjoyed by a prisoner on licence was “more circumscribed in law and more precarious than the freedom enjoyed by the ordinary citizen” but held that it qualified as “freedom” for the purpose of Article 5(1).⁵⁸ The applicant was thus entitled to invoke Article 5(1). Referring to the applicant’s disturbed and aggressive behaviour, the Court found, however, that the decision to revoke his licence and re-detain him had been neither arbitrary nor unreasonable and was, therefore, compatible with Article 5(1).⁵⁹ Once returned to custody and at reasonable intervals thereafter, however, the Court ruled that that the applicant was entitled to have his continued detention reviewed in accordance with Article 5(4).⁶⁰

2.38 The European Court of Human Rights initially drew a distinction between discretionary life sentences and mandatory life sentences.⁶¹ Whereas the discretionary life sentence was composed of both a punitive and a preventative part the mandatory life sentence was wholly punitive. Thus periodic review of detention under a mandatory life sentence was not required. In *Wynne v United Kingdom*⁶² the applicant had received a mandatory life sentence for murder. He had been subsequently released on life licence during which time he killed a woman. The applicant was convicted of manslaughter and the domestic court imposed a discretionary life sentence and revoked his life licence. Once the punitive part of the discretionary life sentence was served, the applicant contended that he was entitled to have his continued detention reviewed.⁶³ The European Court of Human Rights dismissed his claim holding that his conviction for manslaughter did not affect the continued validity of the mandatory life sentence or its reactivation on his recall. The conviction or, more particularly, the discretionary life sentence merely provided a supplementary legal basis for his detention. Citing *Thynne, Wilson and Gunnell v United Kingdom*⁶⁴ the Court held that in the context of mandatory life sentences the guarantee of Article 5(4) was satisfied by the original trial and appeal proceedings.⁶⁵ It thus conferred no additional right to challenge the lawfulness of continuing detention or re-detention following the revocation of a licence. In the course of its judgment, the Court distinguished between discretionary life sentences and mandatory life sentences:

⁵⁶ (1988) 10 EHRR 293.

⁵⁷ *Weeks v United Kingdom* (1988) 10 EHRR 293, paragraph 38.

⁵⁸ *Weeks v United Kingdom* (1988) 10 EHRR 293, paragraph 40.

⁵⁹ *Weeks v United Kingdom* (1988) 10 EHRR 293, paragraph 51.

⁶⁰ *Weeks v United Kingdom* (1988) 10 EHRR 293, paragraph 61.

⁶¹ McCutcheon and Coffey “Life Sentences in Ireland and the European Convention on Human Rights (2006) *Irish Yearbook of International Law* 101 at 104.

⁶² (1995) 19 EHRR 333.

⁶³ *Wynne v United Kingdom* (1995) 19 EHRR 333, paragraph 31.

⁶⁴ (1991) 13 EHRR 666.

⁶⁵ *Wynne v United Kingdom* (1995) 19 EHRR 333, paragraph 36.

“[T]he fact remains that the mandatory sentence belongs to a different category from the discretionary sentence in the sense that it is imposed automatically as the punishment for the offence of murder irrespective of considerations pertaining to the dangerousness of the offender... That mandatory life prisoners do not actually spend the rest of their lives in prison and that a notional tariff period is also established in such cases ... does not alter this essential distinction between the two types of life sentence.”⁶⁶

2.39 In *Thynne, Wilson and Gunnell v United Kingdom*⁶⁷ the applicants were convicted sex offenders who had been sentenced to discretionary terms of life imprisonment. Having served the punitive parts of their sentences, the applicants complained that they had not been able to have their continued detention periodically reviewed in accordance with Article 5(4).⁶⁸ Each of the applicants had been found to be suffering from a mental or personality disorder and to be dangerous and in need of treatment. Since the factors of mental instability and dangerousness were susceptible to change over the passage of time the Court found that new issues of lawfulness could arise during the course of their detention.⁶⁹ Thus the applicants were entitled to have their continued detention reviewed.

2.40 Over time the European Court of Human Rights began to question the distinction between discretionary life sentences and mandatory life sentences.⁷⁰ This initially occurred in several cases concerned with juvenile offenders who had been convicted of murder and sentenced to detention during Her Majesty’s Pleasure. In *Hussain v United Kingdom*⁷¹ the applicant contended that he was entitled to have his continued detention periodically reviewed under Article 5(4).⁷² The Court considered whether a sentence of detention during Her Majesty’s Pleasure was more akin to a discretionary life sentence or a mandatory life sentence.⁷³ The Court observed that the sentence was mandatory in terms of being fixed by law and applicable in all cases where persons under the age of 18 were convicted of murder.⁷⁴ The Court stated, however, that the decisive issue was whether the nature and purpose of the sentence were such as to require the lawfulness of the detention to be periodically reviewed in accordance with Article 5(4).⁷⁵ The Court considered that an indeterminate term of detention for a convicted young person, which might be as long as that person’s life, could only be justified by considerations based on the need to protect the public.⁷⁶ The Court thus concluded that the applicant’s sentence, after the expiration of his tariff, was more comparable to a discretionary life sentence.⁷⁷ The decisive ground for the applicant’s detention had been and continued to be his dangerousness to society.⁷⁸ As this was a characteristic which could change over time, the Court held that the applicant was entitled to have his continued detention periodically reviewed in accordance with Article 5(4).⁷⁹

⁶⁶ *Wynne v United Kingdom* (1995) 19 EHRR 333, paragraph 35.

⁶⁷ (1991) 13 EHRR 666.

⁶⁸ *Thynne, Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666, paragraph 64.

⁶⁹ *Thynne, Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666, paragraph 78.

⁷⁰ McCutcheon and Coffey “Life Sentences in Ireland and the European Convention on Human Rights (2006) *Irish Yearbook of International Law* 101 at 104.

⁷¹ (1996) 22 EHRR 1.

⁷² *Hussain v United Kingdom* (1996) 22 EHRR 1, paragraph 47.

⁷³ *Hussain v United Kingdom* (1996) 22 EHRR 1, paragraph 50.

⁷⁴ *Hussain v United Kingdom* (1996) 22 EHRR 1, paragraph 51.

⁷⁵ *Hussain v United Kingdom* (1996) 22 EHRR 1, paragraph 52.

⁷⁶ *Hussain v United Kingdom* (1996) 22 EHRR 1, paragraph 53.

⁷⁷ *Hussain v United Kingdom* (1996) 22 EHRR 1, paragraph 54.

⁷⁸ *Hussain v United Kingdom* (1996) 22 EHRR 1, paragraph 54.

⁷⁹ *Hussain v United Kingdom* (1996) 22 EHRR 1, paragraph 54.

2.41 The European Court of Human Rights also began to question the role of the Home Secretary in setting the tariff for sentences such as detention at Her Majesty's Pleasure.⁸⁰ In *V and T v United Kingdom*⁸¹ the Court ruled that the fixing of a tariff was a sentencing exercise and that the applicants were thus entitled to the safeguards of Article 6(1) of the *European Convention on Human Rights*⁸² which required that the determination of civil rights and obligations be conducted by an "independent and impartial tribunal".⁸³ As the Home Secretary could not be considered "independent" of the Executive, the Court found that there had been a violation of Article 6(1).⁸⁴

2.42 The distinction between discretionary life sentences and mandatory life sentences finally collapsed in *Stafford v United Kingdom*⁸⁵, when the European Court of Human Rights assimilated the various regimes applicable to discretionary life sentences, mandatory life sentences and sentences of detention during Her Majesty's Pleasure.⁸⁶ The applicant had received a mandatory life sentence for murder. He had been subsequently released on licence which was revoked when he was convicted of a number of fraud offences. Having served his sentence for the fraud offences, the Parole Board recommended that the applicant be released on licence but this was rejected by the Secretary of State on the ground that there was a risk that the applicant would commit further fraud offences.

2.43 The applicant contended that his continued detention was in breach of Article 5(1).⁸⁷ In this regard, he argued that to justify indefinite imprisonment by reference to a risk of future non-violent offending, which involved no physical harm to others and bore no relationship to the criminal conduct which had resulted in the mandatory life sentence, was arbitrary.⁸⁸ For its part, the Government contended that the mandatory life sentence for murder satisfied Article 5(1) and continued to provide a lawful basis for the applicant's detention.⁸⁹ It argued that the mandatory life sentence could be distinguished from the discretionary life sentence as it was imposed as punishment for the seriousness of the offence and was not governed by factors, such as risk and dangerousness, which could change over time.⁹⁰ The applicant further contended that as the basis for his continued detention was the risk of future offending, he was entitled to have his detention reviewed under Article 5(4).⁹¹ He argued that, since *Wynne*, the courts in the United Kingdom had so altered their approach to and understanding of the mandatory life sentence that it was no longer possible to argue that the requirements of Article 5(4) were satisfied by the original trial.⁹² The Government, on the other hand, insisted that where mandatory life sentences were concerned the requirements of Article 5(4) were met by the original trial and appeal proceedings and that no new issues of lawfulness could arise requiring review.⁹³

⁸⁰ McCutcheon and Coffey "Life Sentences in Ireland and the European Convention on Human Rights (2006) *Irish Yearbook of International Law* 101 at 105.

⁸¹ (2000) 30 EHRR 121.

⁸² *V and T v United Kingdom* (2000) 30 EHRR 121, paragraph 111.

⁸³ *V and T v United Kingdom* (2000) 30 EHRR 121, paragraph 114.

⁸⁴ *V and T v United Kingdom* (2000) 30 EHRR 121, paragraph 114.

⁸⁵ (2002) 35 EHRR 32.

⁸⁶ McCutcheon and Coffey "Life Sentences in Ireland and the European Convention on Human Rights (2006) *Irish Yearbook of International Law* 101 at 105.

⁸⁷ *Stafford v United Kingdom* (2002) 35 EHRR 32, paragraph 57.

⁸⁸ *Stafford v United Kingdom* (2002) 35 EHRR 32, paragraph 58.

⁸⁹ *Stafford v United Kingdom* (2002) 35 EHRR 32, paragraph 59.

⁹⁰ *Stafford v United Kingdom* (2002) 35 EHRR 32, paragraph 59.

⁹¹ *Stafford v United Kingdom* (2002) 35 EHRR 32, paragraph 85.

⁹² *Stafford v United Kingdom* (2002) 35 EHRR 32, paragraph 85.

⁹³ *Stafford v United Kingdom* (2002) 35 EHRR 32, paragraph 86.

2.44 The Court held that there was no causal connection between the risk of future non-violent offending and the original mandatory life sentence for murder.⁹⁴ The applicant's re-detention was thus in breach of Article 5(1). The Court referred to legal developments in the United Kingdom and concluded that it could no longer be maintained that where mandatory life sentences were concerned the requirements of Article 5(4) were satisfied by the original trial and appeal proceedings.⁹⁵ Thus detention beyond the expiry of the tariff period could only be justified by considerations of risk and dangerousness associated with the objectives of the original sentence for murder.⁹⁶ As these elements could change over time the Court held that the applicant was entitled to have his detention reviewed under Article 5(4).

2.45 In *Stafford* the European Court of Human Rights was influenced by legal developments in the United Kingdom regarding life sentences. Having regard to these legal developments, the Court came to the conclusion that the distinction between discretionary life sentences, mandatory life sentences and sentences of detention during Her Majesty's Pleasure could no longer be maintained in respect of tariff-fixing:

"The Court considers that it may now be regarded as established in domestic law that there is no distinction between mandatory life prisoners, discretionary life prisoners and juvenile murderers as regards the nature of tariff-fixing. It is a sentencing exercise. The mandatory life sentence does not impose imprisonment for life as a punishment. The tariff, which reflects the individual circumstances of the offence and the offender, represents the punishment. The Court concludes that the finding in *Wynne* that the mandatory life sentence constituted punishment for life can no longer be regarded as reflecting the real position in the domestic criminal justice system of the mandatory life prisoner."⁹⁷

While the Court did not expressly confine this statement to the situation pertaining to the United Kingdom, the fact that it followed its consideration of the legal developments in the United Kingdom suggests that this was the intention. It is thus arguable that *Stafford* is not - as some might suggest - an authority for imposing review requirements on mandatory life sentences in countries, such as Ireland, which do not have a tariff system. This argument gains support in the decision of *Kafkaris v Cyprus*.⁹⁸

2.46 In *Kafkaris* the European Court of Human Rights considered the Cypriot sentencing system which, like Ireland, does not employ a tariff system. The applicant had received a mandatory life sentence for murder. The domestic courts had ruled that a "life sentence" subsisted for the natural life of the prisoner and not 20 years as had been provided by prison regulations. The applicant argued that his rights had been breached under Article 3 and Article 5.

2.47 Regarding Article 3, the applicant contended that his detention after the date at which he would have qualified for ordinary remission, had the sentence been one of 20 years, violated Article 3.⁹⁹ In this regard, the applicant argued that the punitive purpose of the life sentence coupled with its mandatory nature constituted inhuman and degrading treatment. He also argued that his detention beyond the date at which he would have otherwise qualified for ordinary remission had left him in a state of distress and uncertainty over his future. For its part, the Government contended that there had been no violation of Article 3 as the applicant had sufficient hope of release having regard to the President's power to remit, suspend or commute sentences and to order conditional release.¹⁰⁰

2.48 The Court emphasised that treatment must attain a minimum level of severity if it was to fall within the scope of Article 3.¹⁰¹ In this regard, it noted that any suffering or humiliation must exceed the

⁹⁴ *Stafford v United Kingdom* (2002) 35 EHRR 32, paragraph 81.

⁹⁵ *Stafford v United Kingdom* (2002) 35 EHRR 32, paragraph 87.

⁹⁶ *Stafford v United Kingdom* (2002) 35 EHRR 32, paragraph 87.

⁹⁷ *Stafford v United Kingdom* (2002) 35 EHRR 32, paragraph 79.

⁹⁸ (2009) 49 EHRR 35.

⁹⁹ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraphs 80-86.

¹⁰⁰ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraphs 87-95.

¹⁰¹ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 96.

level of suffering and humiliation inherent in legitimate punishment.¹⁰² The Court stated that while the imposition of a life sentence was not in itself contrary to Article 3 the imposition of an irreducible life sentence might be.¹⁰³ Thus a life sentence would not be considered irreducible where national law afforded the possibility of review with a view to commuting, remitting or terminating the sentence or ordering conditional release.¹⁰⁴ The Court thus ruled that while a life sentence without a minimum term would entail anxiety and uncertainty regarding prison life these were inherent in the nature of the sentence imposed.¹⁰⁵ Furthermore, while there was no parole board, the President could suspend, remit or commute any sentence and order conditional release.¹⁰⁶ As these constituted prospects for release, the Court found that there had been no inhuman or degrading treatment contrary to Article 3.¹⁰⁷

2.49 Regarding Article 5(1), the applicant contended that he had exhausted the punitive part of his sentence on the date at which he would otherwise have qualified for ordinary remission.¹⁰⁸ His detention beyond that date was thus arbitrary and disproportionate as there was no evidence to suggest that he represented a danger to the public. The Government submitted that as the mandatory life sentence in Cyprus was not composed of a punitive part and a preventative part detention was not subject to factors such as risk and dangerousness to the public.¹⁰⁹

2.50 The Court accepted that the mandatory life sentence had been imposed “as the punishment for the offence of premeditated murder irrespective of considerations pertaining to the dangerousness of the offender”.¹¹⁰ It thus held that there was a clear and sufficient causal connection between the conviction and the applicant’s continuing detention.¹¹¹ There was thus no breach of Article 5(1).

2.51 Regarding Article 5(4), the applicant contended that the mandatory nature of life imprisonment coupled with the absence of a parole system violated Article 5(4).¹¹² The Government submitted that the requirements of Article 5(4) had been incorporated in the original sentence.¹¹³

2.52 The Court found that the Article 5(4) complaint was inadmissible and thus refrained from ruling on the matter.¹¹⁴ This is unfortunate as it would have been a useful opportunity for the Court to clarify whether the judicial statements in *Wynne* or *Stafford* should apply in countries which do not have a tariff system. It may be recalled that in *Wynne* the Court indicated that where a mandatory life sentence was concerned the requirements of Article 5(1) were satisfied by the original trial and appeal proceedings whereas in *Stafford* the Court indicated that this could no longer be considered the case.

¹⁰² *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 97.

¹⁰³ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 98.

¹⁰⁴ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 99. See also joint partly dissenting opinion of Judges Tulkens, Cabral Barreto, Fura-Sandstrom, Spielmann and Jebens: “[T]he prospect of release, even if limited, must exist de facto in concrete terms, particularly so as not to aggravate the uncertainty and distress inherent in a life sentence. By ‘de facto’ we mean a genuine possibility of release. That was manifestly not the case in this instance” at paragraph O-II4.

¹⁰⁵ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 108.

¹⁰⁶ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraphs 104-105.

¹⁰⁷ It is interesting to note that a sizeable minority emphasised that a life sentence which impeded the purpose of reintegration might constitute inhuman and degrading treatment. See joint partly dissenting opinion of Judges Tulkens, Cabral Barreto, Fura-Sandstrom, Spielmann and Jebens at paragraph O-II13.

¹⁰⁸ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraphs 111-112.

¹⁰⁹ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraphs 113-116.

¹¹⁰ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 120.

¹¹¹ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 121.

¹¹² *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 123.

¹¹³ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 124.

¹¹⁴ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 125.

2.53 The Court emphasised that, in the absence of “a clear and commonly accepted standard amongst the member States”,¹¹⁵ it is within the margin of appreciation of each member State to choose its own “criminal justice system, including sentence review and release arrangements”.¹¹⁶ However, Judge Bratza, in a concurring opinion, expressed the view that the principles outlined in *Stafford* should apply to all member States, regardless of whether or not they had a tariff system:

“[E]ven in the absence of a tariff system, it appears to me that the Court’s reasoning in the *Stafford* case may not be without relevance to a system such as exists in Cyprus where there is an express power of conditional release which is applicable even in the case of a mandatory life prisoner. The question whether conditional release should be granted in any individual case must ... principally depend on an element of punishment for the particular offence and, if so, whether the life prisoner poses a continuing danger to society. As the *Stafford* judgment makes clear, the determination of both questions should in principle be in the hands of an independent body, following procedures containing the necessary judicial safeguards, and not of an executive authority.”¹¹⁷

2.54 In sum, therefore, it would appear from *Kafkaris* that the Irish approach to the life sentence is broadly consonant with the principles of the *European Convention on Human Rights*. Like the Supreme Court, the European Court of Human Rights distinguished between countries, such as the United Kingdom, which had a tariff system and countries, such as Cyprus and Ireland, which did not. It emphasised that in the absence of a discernible trend amongst member States that it was still within the margin of appreciation of each member state to decide on the system to be adopted in respect of life sentences provided that the system was within the bounds of the Convention. The Court stated that a mandatory life sentence would not in itself give rise to issues under Article 3, provided that there was a *de facto* and *de jure* possibility of release. And, in respect of Article 5(1), it stated that where a mandatory life sentence was concerned there was a sufficient causal connection between the conviction for murder and the continued detention. The position regarding Article 5(4) is, however, less clear.

2.55 Even in the absence of a definitive ruling regarding Article 5(4), a number of observations may be made. As noted at paragraph 2.35, the general purpose of Article 5 is to prevent arbitrariness. In this regard, the position of the European Court of Human Rights is to query the absence of (i) any judicial involvement in determining the actual length of the term to be served in prison; and (ii) any involvement by a body independent of the Executive in the release decision.

D Section 4, Criminal Justice Act 1990

2.56 Section 4 of the *Criminal Justice Act 1990* replaced section 3 of the *Criminal Justice Act 1964* which made the former offence of capital murder punishable by the death penalty.¹¹⁸ Section 4 of the *Criminal Justice Act 1990* prescribes the penalties for murder contrary to section 3 of the 1990 Act and any attempt to commit such a murder. While section 3 murder, like any other murder, is subject to a mandatory life sentence,¹¹⁹ section 4 stipulates that the offender must serve a minimum term of 40 years imprisonment for a section 3 murder and 20 years for an attempt.

2.57 While it may seem curious that the Oireachtas would select a period of 40 years as the minimum term to be served in prison by a person convicted of a section 3 offence, the then Minister for Justice explained the rationale as follows:

¹¹⁵ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 105. See also the joint partly dissenting opinion of Judges Tulkens, Cabral Barreto, Fura-Sandstrom, Spielmann and Jebens, who did not agree with this statement and identified trends at the Council of Europe, European Union and international criminal justice levels at paragraphs O-II9-O-II12.

¹¹⁶ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph 100.

¹¹⁷ *Kafkaris v Cyprus* (2009) 49 EHRR 35, paragraph O-18, concurring opinion of Judge Bratza.

¹¹⁸ The definition of murder contrary to section 3 of the 1990 Act is almost identical to the definition of capital murder.

¹¹⁹ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 244.

“In deciding what penalty to propose in the Bill to replace the death penalty I was guided by a number of concerns. One, by the fact that the offences in question represent... an attack on the institutions of the State. Two, that we have a largely unarmed Garda Force whose only protection from those with murderous intent is the statutory protection we can afford them by way of a penalty with deterrent effect. Three, the security situation which exists in this country where there are armed subversive groups operating which represent a particular threat to our democratic institutions. Four, very heavy maximum penalties are already prescribed for the types of crimes which might give rise to the circumstances where a Garda’s life is put in danger. For example, the maximum penalty for armed robbery is life imprisonment. An ordinary sentence of life imprisonment for the murder of a Garda is very unlikely, therefore, to have any deterrent effect on an armed robber who is trying to evade capture. Five, what has for many years past been effectively the penalty for capital offences, namely, 40 years imprisonment.”¹²⁰

2.58 In the absence of case law regarding section 4 of the 1990 Act, it is interesting to note that similar comments were made by the Supreme Court in respect of section 3 of the 1964 Act:

“I think it is a fair inference... that the Oireachtas bore in mind when enacting this legislation that our police force was an unarmed police force and had a special claim to whatever additional protection the law could give its members by providing the deterrent of the death penalty for violent criminals with whom members of the Garda Síochána often have to contend. The same or similar circumstances probably existed with regard to the murder of prison officers in the course of their duty as the type of criminal likely to be involved in such an affair would probably not be deterred by the threat of a prison sentence.”¹²¹

2.59 Section 5(1) of the 1990 Act precludes the possibility of commuting or remitting the section 4 sentence until the minimum period specified by the court has expired. However, section 5(2) permits the grant of standard remission under the *Prison Rules*. Thus the minimum period ordered to be served might be reduced by one-fourth. Furthermore, section 5(3) permits a limited form of temporary release for “grave reasons of a humanitarian nature”.¹²²

2.60 Regarding this aspect of the 1990 Act, the Minister stated:

“[I]t is my belief that once we have determined to prescribe a heavy mandatory penalty as a deterrent to the murder of Garda and prison officers, we must, if it is to have the desired deterrent effect, make it abundantly clear that it will not be watered down. This is why the Bill provides for the exclusion of the powers of remission and early release normally exercisable by the Government or by the Minister. Of course, it will still be possible for the President to exercise his constitutional power to remit or commute a sentence on the advice of the Government. It could be in a very rare and exceptional case that this avenue could be followed.”¹²³

E Comparative Analysis

(1) Northern Ireland

2.61 In Northern Ireland, section 1(1) of the *Northern Ireland (Emergency Provisions) Act 1973* abolished the death penalty for murder and replaced it with the mandatory life sentence.

2.62 A review of Northern Ireland’s criminal justice system was conducted,¹²⁴ prior to the commencement of the United Kingdom *Human Rights Act 1998*, and a review of Northern Ireland’s

¹²⁰ Dáil Debates, Criminal Justice (No.2) Bill 1990: Committee and Final Stages, Vol. 339 No. 10, p.22, 12 June 1990 (Minister for Justice).

¹²¹ *People (DPP) v Murray* [1977] 1 IR 360, 378 (Walsh J). Similar comments were made by Henchy J and Griffin J.

¹²² O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at paragraph 10.04.

¹²³ Dáil Debates, Criminal Justice (No.2) Bill 1990: Committee and Final Stages, Vol. 339 No. 10, p.22, 12 June 1990 (Minister for Justice).

¹²⁴ *Review of the Criminal Justice System in Northern Ireland* (Criminal Justice Review Group, 2000).

sentencing framework was conducted,¹²⁵ following the enactment of the United Kingdom *Criminal Justice Act 2003* in England and Wales. As a result of the recommendations contained in these reviews,¹²⁶ an order was adopted to ensure that the *punitive* or *tariff period* of life sentences was judicially determined¹²⁷ and that the suitability of prisoners for release was assessed by an independent body of judicial character. For this purpose, Part II of the *Life Sentences (Northern Ireland) Order 2001* established the “Life Sentence Review Commissioners”, which were renamed the “Parole Commissioners for Northern Ireland” in 2008.¹²⁸

2.63 Section 5 of the *Life Sentences (Northern Ireland) Order 2001* provides that where a court passes a life sentence it must specify a period to be served by the offender “to satisfy the requirements of retribution and deterrence”.¹²⁹ Once this period has been served, the offender may be considered for release by the Parole Commissioners. The Parole Commissioners may only direct the release of the prisoner if the prisoner’s case has been referred to them by the Secretary of State and if they are satisfied that the prisoner’s continued detention is not necessary for the protection of the public from serious harm.¹³⁰ Release is “on licence” and may be revoked by the Secretary of State where this has been recommended by the Parole Commissioners or where the Secretary of State considers it expedient in the public interest to do so.¹³¹

2.64 Section 23 of the *Northern Ireland Act 1998*, as amended,¹³² provides that the royal prerogative of mercy is exercisable on the Queen’s behalf by the Northern Ireland Minister for Justice. The royal prerogative will be considered in greater detail in the next section. It suffices to observe at this juncture that its exercise has been mostly superseded by statutory provisions.¹³³

(2) England and Wales

2.65 In England and Wales, section 1(1) of the *Murder (Abolition of the Death Penalty) Act 1965* abolished the death penalty for murder and replaced it with the mandatory life sentence.¹³⁴ For an offender who is less than 18 years of age, section 90 of the *Powers of the Criminal Courts (Sentencing) Act 2000* provides that the appropriate sentence is one of detention during “Her Majesty’s pleasure”.

2.66 Section 269 of the *Criminal Justice Act 2003* provides that the sentencing court must specify a period to be served by the offender before he or she may be considered for release by the Parole Board.¹³⁵ The Parole Board may only direct the release of the prisoner if the prisoner’s case has been referred to it by the Secretary of State and if it is satisfied that the prisoner’s continued detention is not

¹²⁵ *Consultation on the Review of the Sentencing Framework in Northern Ireland* (Northern Ireland Office, 2005).

¹²⁶ *Annual Report 2009-2010* (Parole Commissioners of Northern Ireland, 2010) at page 4 ff.

¹²⁷ Article 3 of the *Life Sentences (Northern Ireland) Order 2001*.

¹²⁸ Article 46(1) of the *Criminal Justice (Northern Ireland) Order 2008* substituted the name “Parole Commissioners” for “Life Sentence Commissioners”

¹²⁹ Slapper and Kelly *The English Legal System: 2009-2010* (Taylor and Francis, 2009) at 513.

¹³⁰ Article 6(4) of the *Life Sentences (Northern Ireland) Order 2001*.

¹³¹ Article 28(2) of the *Criminal Justice (Northern Ireland) Order 2008*.

¹³² Section 24 of the *Northern Ireland Act 1998 (Devolution of Policing and Justice Functions) Order 2010*.

¹³³ For example, Article 20 of the *Criminal Justice (Northern Ireland) Order 2008* and Article 7 of the *Life Sentences (Northern Ireland) Order 2001* provide for the grant of temporary release on compassionate grounds.

¹³⁴ Section 3(3) of the *Murder (Abolition of the Death Penalty) Act 1965* provides that the Act does not apply to Northern Ireland.

¹³⁵ Section 269(1) of the *Criminal Justice Act 2003* provides that section 269 applies where *after the commencement* of the section a court passes a life sentence in circumstances where the sentence is fixed by law. See Slapper and Kelly *The English Legal System: 2009-2010* (Taylor and Francis, 2009) at 513ff.

necessary for the protection of the public.¹³⁶ If the Parole Board considers this to be the case, the Secretary of State must release the prisoner on licence.

2.67 It is interesting to note that the earliest precursor to section 269 is section 1(2) of the *Murder (Abolition of the Death Penalty) Act 1965*. Section 1(2), which remains in force, provides that where a court sentences a person convicted of murder to life imprisonment, it *may* recommend to the Secretary of State a minimum period which should elapse before the Secretary of State can direct that the person be released on licence.¹³⁷ It was noted that this power to recommend a minimum term was used sparingly and, then, only to indicate a long period of imprisonment for the worst cases of murder.¹³⁸

2.68 In 1973, the Criminal Law Revision Committee published a report in which it reviewed section 1(2) of the 1965 Act and made a number of recommendations.¹³⁹ It concluded that the courts should not be required to exercise the power to recommend a minimum term in every case;¹⁴⁰ that any recommendation should not be binding;¹⁴¹ that any recommendation should be considered part of the sentence and, therefore, appealable;¹⁴² and that the court should not be required to give reasons for its recommendation.¹⁴³ In addition, the Committee compared the role of the judiciary in England and Wales to the role of the judiciary in Scotland, prior to the enactment of the *Murder (Abolition of the Death Penalty) Act 1965*. By contrast to Scotland, where the judiciary had virtually no role, the judiciary in England and Wales had always had some involvement in the determination of the length of sentences to be served by those convicted of murder - three High Court Judges served on the Parole Board and the Lord Chief Justice was consulted in every case before a murderer was released, as was the trial judge where available.¹⁴⁴

2.69 On rare occasions, a prisoner serving a life sentence might benefit from the exercise of the royal prerogative of mercy.¹⁴⁵ The royal prerogative of mercy is the power by which the Queen, on the advice of the Secretary of State for Justice, may intervene to mitigate or extinguish punishment for an offence.¹⁴⁶ Traditionally, there have been three types of pardon, namely, the free, conditional and remission pardons. A *free pardon* is usually granted where new evidence has come to light to show that no crime has been committed or that the particular individual is not the perpetrator.¹⁴⁷ While it brings the sentence to an end, it does not quash or overturn the conviction. A *conditional pardon*, on the other hand, substitutes one type of sentence for another.¹⁴⁸ During the twentieth century, it was used almost exclusively to replace the death penalty for murder with a life sentence. A *remission pardon* is usually

¹³⁶ Section 28 of the *Crime (Sentences) Act 1997*, as amended by section 275 of the *Criminal Justice Act 2003*.

¹³⁷ Section 1(2) of the *Murder (Abolition of Death Penalty) Act 1965*.

¹³⁸ Blom-Cooper "The Penalty for Murder" (1973) *Brit J Criminology* 188 at 188.

¹³⁹ *Penalty for Murder* (Twelfth Report of the Criminal Law Revision Committee, 1973).

¹⁴⁰ *Penalty for Murder* (Twelfth Report of the Criminal Law Revision Committee, 1973) at 15.

¹⁴¹ *Penalty for Murder* (Twelfth Report of the Criminal Law Revision Committee, 1973) at 17.

¹⁴² *Penalty for Murder* (Twelfth Report of the Criminal Law Revision Committee, 1973) at 18.

¹⁴³ *Penalty for Murder* (Twelfth Report of the Criminal Law Revision Committee, 1973) at 19.

¹⁴⁴ *Penalty for Murder* (Twelfth Report of the Criminal Law Revision Committee, 1973) at 10.

¹⁴⁵ *Governance of Britain - Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, 2009) at page 15.

¹⁴⁶ *Governance of Britain - Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, 2009) at page 15.

¹⁴⁷ *Governance of Britain - Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, 2009) at page 15.

¹⁴⁸ *Governance of Britain - Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, 2009) at page 16.

granted for one of the following reasons:¹⁴⁹ (i) compassionate grounds; (ii) information helping to bring others to justice; (iii) the prevention of escape, injury or death; or (iv) mistakes surrounding a prisoner's release date. The remission pardon releases the prisoner from having to serve all or a part of the remainder of his or her sentence. It has been noted that the use of prerogative powers to grant free, conditional and remission pardons has been largely superseded by statutory provisions.¹⁵⁰

(3) Scotland

2.70 The *Murder (Abolition of the Death Penalty) Act 1965* also applied to Scotland.¹⁵¹ Section 1(1) of the 1965 Act abolished the death penalty and replaced it with the mandatory life sentence, for a period of five years. This was made permanent by a resolution of the Scottish Parliament on 31 December 1969. Section 205 of the *Criminal Procedure (Scotland) Act 1995* provides that a person convicted of murder must be sentenced to life imprisonment.

2.71 As in England and Wales the sentencing court must specify a minimum term to be served by the offender before he or she may be considered for release. Section 3 of the *Prisoners and Criminal Proceedings (Scotland) Act 1993*, as amended,¹⁵² provides that the sentencing court must specify a "punishment part" to be served by the offender "to satisfy the requirements of retribution and deterrence".¹⁵³ Once this punishment part has been served, the offender may be considered for release by the Parole Board. The Parole Board may only direct the release of the prisoner if the prisoner's case has been referred to it by the Secretary of State and if it is satisfied that the prisoner's continued detention is not necessary for the protection of the public.¹⁵⁴ If the Parole Board considers this to be the case, the Secretary of State must release the prisoner on licence.¹⁵⁵

2.72 It is interesting to note that the earliest precursor to section 3 of the 1993 Act was also section 1(2) of the *Murder (Abolition of the Death Penalty) Act 1965*. In 1972, prior to the publication of the report of the Criminal Law Revision Committee in England and Wales, the Lord Emslie Committee published a report in which it reviewed section 1(2) and made a number of recommendations.¹⁵⁶ It concluded that the courts should be required, save in exceptional circumstances, to declare a minimum term;¹⁵⁷ that any

¹⁴⁹ *Governance of Britain - Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, 2009) at page 16-17.

¹⁵⁰ *Governance of Britain - Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, 2009) at page 17. Thus, for example, section 248 of the *Criminal Justice Act 2003* empowers the Secretary of State to release both determinate and life sentence prisoners on compassionate grounds.

¹⁵¹ Tadros "The Scots Law of Murder" in *The Law of Murder: Overseas Comparative Studies* (Law Commission, 2005) at pages 87-105. Sheehan and Dickson *Criminal Procedure - Scottish Criminal Law and Practice Series* (LexisNexis Butterworths, 2nd ed, 2003) at page 329.

¹⁵² *Criminal Justice (Scotland) Act 2003* and *Convention Rights (Compliance) Scotland Act 2001*, as amended by section 16(1), section 16(2), paragraph 14 of Schedule 1 and Schedule 3 of the *Crime and Punishment (Scotland) Act 1997* and the *Convention Rights (Compliance) Scotland Act 2001*.

¹⁵³ Section 2(2) of the *Prisoners and Criminal Proceedings (Scotland) Act 1993*, as amended by section 16(1), section 16(2), paragraph 14 of Schedule 1 and Schedule 3 of the *Crime and Punishment (Scotland) Act 1997* and the *Convention Rights (Compliance) Scotland Act 2001*. See Slapper and Kelly *The English Legal System: 2009-2010* (Taylor and Francis, 2009) at 513.

¹⁵⁴ Section 2(5) of the *Prisoners and Criminal Proceedings (Scotland) Act 1993*, as amended by section 16(1), section 16(2), paragraph 14 of Schedule 1 and Schedule 3 of the *Crime and Punishment (Scotland) Act 1997* and the *Convention Rights (Compliance) Scotland Act 2001*.

¹⁵⁵ Section 2(4) of the *Prisoners and Criminal Proceedings (Scotland) Act 1993*, as amended by section 16(1), section 16(2), paragraph 14 of Schedule 1 and Schedule 3 of the *Crime and Punishment (Scotland) Act 1997* and the *Convention Rights (Compliance) Scotland Act 2001*.

¹⁵⁶ *The Penalties for Murder* (Report of the Lord Emslie Committee, 1972).

¹⁵⁷ *The Penalties for Murder* (Report of the Lord Emslie Committee, 1972) at paragraph 92.

recommendation should be appealable;¹⁵⁸ and that the courts should be required to provide reasons for a particular recommendation or for refraining from making a recommendation.¹⁵⁹

2.73 In Scotland, the responsibility for recommending the exercise of the royal prerogative of mercy is devolved to Scottish Ministers by virtue of section 53 of the *Scotland Act 1998*.¹⁶⁰ As observed in respect of Northern Ireland and England and Wales, the royal prerogative of mercy has been superseded in many instances by statutory provisions.¹⁶¹ The effect of a pardon is to free the convicted person from the effects of the conviction, but it does not quash the conviction.¹⁶² Pardons are only granted in exceptional circumstances where no other remedy is open to the convicted person.

(4) United States

2.74 In the United States, most states retain the death penalty for either first degree murder or “capital murder”. All of these states require the jury to find that any mitigating factors are outweighed by certain aggravating factors.¹⁶³ In the event that this is not the case or, indeed, the death penalty is not

¹⁵⁸ *The Penalties for Murder* (Report of the Lord Emslie Committee, 1972) at paragraph 98.

¹⁵⁹ *The Penalties for Murder* (Report of the Lord Emslie Committee, 1972) at paragraph 102.

¹⁶⁰ *Governance of Britain - Review of the Executive Royal Prerogative Powers: Final Report* (Ministry of Justice, 2009) at page 17.

¹⁶¹ For example, section 3 of the *Prisoners and Criminal Proceedings (Scotland) Act 1993* empowers the Secretary of State, on the advice of the Parole Board, to grant temporary release on compassionate grounds.

¹⁶² Sheehan and Dickson *Criminal Procedure - Scottish Criminal Law and Practice Series* (LexisNexis Butterworths, 2nd ed, 2003) at paragraph 443.

¹⁶³ Finkelstein “Report on Basic Aspects of the Law of Murder in the United States: The Examples of California and New York” in *The Law of Murder: Overseas Comparative Studies* (Law Commission, 2005) at pages 106-117 at page 107. *Alabama Criminal Code*, § 13A-5-39 (definition of capital offense) and § 13A-5-40 (murder/capital offense); *Arizona Criminal Code*, § 13-751 and §13-752 (procedure) and § 13-1105 (first degree murder); *Arkansas Code (Title 5 Criminal Offenses)*, § 5-10-101 (capital murder); *California Penal Code*, § 190 (first degree murder); *Colorado Criminal Code*, § 18-1.3-401(4)(a) (classification of felonies), § 18-1.3-1201 and § 18-1.3-1302 and § 18-1.4-102 (procedure) and § 18-3-102 (first degree murder, class 1 felony); *Connecticut Penal Code*, § 53a-46a (procedure, capital felony, death penalty), § 53a-54a (murder, definition, penalty) and § 53a-54b (capital felony, definition); *Delaware Code*, Title 11 § 4209(a) (first degree murder); *Florida Statutes (Title XLVI Crimes)*, § 775.082 (capital felony, death penalty), § 782.04 (first degree murder, capital felony) and § 921.141 (procedure); *Georgia Code*, § 6-5-1 (murder); *Idaho Statutes (Title 18 Crimes and Punishments)*, § 18-4004 (first degree murder); *Illinois Unified Code of Corrections*, § 5-4.5-20 (first degree murder) and *Illinois Criminal Code*, § 9-1 (first degree murder); *Indiana Code* § 35-42-1-1 (murder, felony), § 35-50-2-3 (murder, death penalty) and § 35-50-2-9 (procedure); *Kansas Statutes (Chapter 21 Crimes and Punishments)*, § 21-3401 (first degree murder, off-grid person felony), § 21-3439 (capital murder, off-grid person felony), § 21-4622 (capital murder; death penalty) and Section 21-4624 (procedure); *Kentucky Penal Code*, § 431.060 (felony, definition), § 507.010 (capital offense, felony), § 507.020 (murder, capital offense) and § 532.025 (procedure); *Louisiana Revised Statutes (Title 14 Criminal Law)*, § 14:30 (first degree murder); *Maryland Code, Crim Law* § 2-201 (first degree murder, death penalty) and § 2-202 (procedure); *Mississippi Code (Title 97 Crimes)*, § 97-3-21 (capital murder); *Missouri Revised Statutes (Title XXXVIII Crimes and Punishments)*, § 565.020 (first degree murder); *Montana Annotated Code (Title 45 Crimes)*, § 45-5-102 (deliberate homicide) and § 46-18-301 to § 46-18-310 (procedure); *Nebraska Revised Statutes* § 28-303 (first degree murder); *Nevada Revised Statutes (Title 15 Crimes and Punishments)*, § 200.030 (first degree murder); *New Hampshire Criminal Code*, § 630:1 (capital murder); *North Carolina General Statutes (Chapter 14 Criminal Law)*, § 14-17 (first degree murder); *Ohio Revised Code (Title [29] XXIX Crimes - Procedure)* § 2901.02(B) (aggravated murder, capital offense), § 2903.01 (aggravated murder defined), § 2903.02 (murder defined), § 2929.02 (aggravated murder, death penalty) and § 2929.022, § 2929.03 and § 2929.04 (procedure); *Oklahoma Penal Code*, § 21-701.9 (first degree murder) and § 21-701.10 (procedure); *Oregon Revised Statutes (Volume 4 Criminal Procedure Crimes)*, § 163.095 (aggravated murder defined), § 163.105 (aggravated murder) and § 163.150 (procedure); *Pennsylvania Consolidated Statutes (Title 18 Crimes and Offenses)*, § 1102(a) (first degree murder) and *(Title 42 Judiciary and Judicial Procedure)*

sought by the prosecution, these states provide for less severe sanctions such as life imprisonment with or without parole.¹⁶⁴ The few remaining states have abolished the death penalty and require instead the imposition of determinate sentences or life sentences with or without parole.¹⁶⁵

§ 9711 (life); *South Carolina Code of Laws (Title 16 Crimes and Offenses)*, § 16-3-10 (murder defined) and § 16-3-20 (murder); *South Dakota Codified Laws (Title 22 Crimes)*, § 22-6-1 (class A felony; death penalty), § 22-16-4 (first degree murder defined), § 22-16-12 (first degree murder; class A felony) and § 23A-27A-4 (procedure); *Tennessee Code (Title 39 Criminal Offenses)*, § 39-13-202 (first degree murder) and § 39-13-204 (procedure); *Texas Penal Code*, § 12.31 (capital felony, death penalty) and § 19.03 (capital murder, capital felony); *Utah Criminal Code*, § 76-3-206 (capital felony, death penalty), § 76-3-207 (procedure) and § 76-5-202 (aggravated murder, capital felony); *Virginia Code (Title 18.2 Crimes and Offenses)*, § 18.2-10 (class 1 felony, death penalty) and § 18.2-31 (capital murder; class 1 felony); *Washington Revised Code (Title 10 Criminal Procedure)*, § 10.95.030 (aggravated first degree murder); *Wyoming Code (Title 6 Crimes and Offenses)*, § 6-2-101 (first degree murder) and § 6-2-102 (procedure); *United States Code (Title 18 Crimes and Criminal Procedure)*, § 3591 (various types of murder).

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Alabama Criminal Code, § 13A-5-39 (definition of capital offense, life imprisonment without parole) and § 13-5-40 (murder/capital offense); *Arizona Criminal Code*, § 13-751 and §13-752 (procedure, life or natural life imprisonment) and § 13-1105 (first degree murder, life imprisonment); *Arkansas Code (Title 5 Criminal Offenses)*, § 5-10-101 (life imprisonment without parole); *California Penal Code*, § 190 (life without parole or 25 years to life); *Colorado Criminal Code*, § 18-1.3-401(4)(a) (life without parole), § 18-1.3-1201 and § 18-1.3-1302 and § 18-1.4-102 (procedure) and § 18-3-102 (first degree murder, class 1 felony); *Connecticut Penal Code*, § 53a-35 and § 53a-35a (life without parole) and § 53a-46a (procedure, capital felony, life without parole); *Delaware Code*, Title 11 § 4209 (life without parole); *Florida Statutes (Title XLVI Crimes)*, § 775.082 (life without parole), § 782.04 (first degree murder, capital felony) and § 921.141 (procedure); *Georgia Code*, § 6-5-1 (life imprisonment with or without parole); *Idaho Statutes (Title 18 Crimes and Punishments)*, § 18-4004 (fixed life sentence or life with minimum term to be served without parole); *Illinois Unified Code of Corrections*, § 5-4.5-20 (determinate sentence or natural life), § 5-8-1 (natural life) and § 5-8-2 (determinate term) and *Illinois Criminal Code*, § 9-1 (first degree murder); *Indiana Code*, § 35-42-1-1 (murder, felony), § 35-50-2-3 (determinate term or life without parole) and § 35-50-2-9 (procedure); *Kansas Statutes (Chapter 21 Crimes and Punishments)*, § 21-3401 (first degree murder, off-grid person felony), § 21-3439 (capital murder, off-grid person felony), § 21-4622 (capital murder, life without parole) and Section 21-4624 (procedure); *Kentucky Penal Code*, § 431.060 (felony, definition), § 507.010 (capital offense, felony), § 507.020 (murder; capital offense) and § 532.025 (procedure, life without parole or life without parole for a minimum period); *Louisiana Revised Statutes (Title 14 Criminal Law)*, § 14:30 (life without parole); *Maryland Code, Crim Law* § 2-201 (life without parole or life) and § 2-202 (procedure); *Mississippi Code (Title 97 Crimes)*, § 97-3-21 (life with or without parole); *Missouri Revised Statutes (Title XXXVIII Crimes and Punishments)*, § 565.020 (life without parole); *Montana Annotated Code (Title 45 Crimes)*, § 45-5-102 (life imprisonment or determinate sentence); *Nebraska Revised Statutes*, § 28-303 (); *Nevada Revised Statutes (Title 15 Crimes and Punishments)*, § 200.030 (life with or without parole or a determinate term); *New Hampshire Criminal Code*, § 630:5 (life without parole); *North Carolina General Statutes (Chapter 14 Criminal Law)*, § 14-17 (life without parole); *Ohio Revised Code (Title [29] XXIX Crimes - Procedure)* § 2929.02 (life with or without parole); *Oklahoma Penal Code*, § 21-701.9 (life with or without parole) and § 21-701.10 (procedure); *Oregon Revised Statutes (Volume 4 Criminal Procedure Crimes)*, § 163.105 (life with or without parole) and § 163.150 (procedure); *Pennsylvania Consolidated Statutes (Title 18 Crimes and Offenses)*, § 1102 (first degree murder) and *(Title 42 Judiciary and Judicial Procedure)* § 9711 (life); *South Carolina Code of Laws (Title 16 Crimes and Offenses)*, § 16-3-20 (30 years to life or life without parole); *South Dakota Codified Laws (Title 22 Crimes/23A)*, § 22-6-1 (Class A felony; life), § 22-16-12 (murder; class A felony) and § 23A-27A-4 (procedure); *Tennessee Code (Title 39 Criminal Offenses)*, § 39-13-202 (life with or without parole); *Texas Penal Code*, § 12.31 (life with or without parole); *Utah Criminal Code*, § 76-3-206 (25 years to life or life without parole) and § 76-5-202 (aggravated murder, capital felony); *Virginia Code (Title 18.2 Crimes and Offenses)*, § 18.2-10 (class 1 felony, life) and § 18.2-31 (capital murder, class 1 felony); *Washington Revised Code (Title 10 Criminal Procedure)*, § 10.95.030 (life without parole); *Wyoming Code (Title 6 Crimes and Offenses)*, § 6-2-101 (life with or without parole); *United States Code (Title 18 Crimes and Criminal Procedure)*, § 3591.

2.75 Originally, there were 52 parole boards operating in the United States. These included a federal parole board, a parole board for the District of Columbia and a parole board for each of the 50 states.¹⁶⁶ However, as Kinnevy and Caplan observe:

“Disparity of parole decisions across U.S. jurisdictions and among individual prisoners, lack of support for prisoner rehabilitation, and public perceptions that the criminal justice system was too lenient led to widespread reform movements in the mid 1970s which sought to, among other things, reduce parole releases. During this ‘get tough’ movement U.S. states attempted to do away with the individualization of offender punishment and release by reducing parole officials’ discretion, creating mandatory fixed sentence lengths, and making parole processes more actuarial. Almost simultaneously, many of these same states and the federal government catered to the demands of a burgeoning victims’ rights movement by legislatively authorizing victims to provide input to judges and parole board members in order to explain how their crimes affected them on a personal and individual basis.”¹⁶⁷

As a result, over a period of time a number of the parole boards abolished parole in respect of criminal offences after a certain date.¹⁶⁸

¹⁶⁵ *Alaska Code of Criminal Procedure* § 12.55.125 (first degree murder, 20 to 99 years) and *Alaska Statutes* § 11.41.100 (first degree murder definition); *District of Columbia Official Code (Division IV Criminal Law and Procedure and Prisoners)*, § 22-2104 (first degree murder, 30 years to life without parole); *Hawaii Penal Code*, § 706-656 (first degree murder, life without parole); *Iowa Code (Title XVI Criminal Law and Procedure)*, § 707.2 (first degree murder; class A felony) and § 902.1 (life without parole); *Maine Criminal Code*, 17-A § 1251 (murder, 25 years to life); *Massachusetts General Laws (Part III Courts, Judicial Officers and Proceedings in Civil Cases)* chapter 265 § 2 (first degree murder: death or life without parole) but was found to be unconstitutional in *Commonwealth v Colon-Cruz* 393 Mass. 150 (1984); *Michigan Penal Code*, § 750.316 (first degree murder, life); *Minnesota Criminal Code*, § 609.185 (first degree murder, life); *New Jersey Code of Criminal Justice*, § 2C:11-3 (first degree murder, 30 years to life without parole); *New Mexico Annotated Statutes (Chapter 30 Criminal Offenses)* § 30-2-1 (first degree murder, capital felony) and (*Chapter 31 Criminal Procedure*) § 31-18-4 (capital felony, life with or without parole); *New York Penal Code* § 70.00 (class A felony, life) and § 125.27 (first degree murder, class A felony); *North Dakota Criminal Code*, § 12.1-16-01 (murder, class AA felony) and § 12.1-32.1 (class AA felony, life without parole); *Rhode Island General Laws (Title 11 Criminal Offenses)*, § 11-23-2 (first degree murder, life with or without parole); *Vermont Statutes (Title 13 Crimes and Criminal Procedure)*, § 2303 (first degree murder, 35 years to life without parole); *West Virginia Code (Chapter 61 Crimes and their Punishment)* § 61-2-2 (first degree murder, life); *Wisconsin Criminal Code* § 939.50(3)(a) (class A felony, life imprisonment) and § 940.01 (first degree murder, class A felony).

¹⁶⁶ Alabama; Alaska; Arizona; Arkansas; California; Colorado; Connecticut; Delaware; Florida; Georgia; Hawaii; Idaho; Illinois; Indiana; Iowa; Kansas; Kentucky; Louisiana; Maine; Maryland; Massachusetts; Michigan; Minnesota; Mississippi; Missouri; Montana; Nebraska; Nevada; New Hampshire; New Jersey; New Mexico; New York; North Carolina; North Dakota; Ohio; Oklahoma; Oregon; Pennsylvania; Rhode Island; South Carolina; South Dakota; Tennessee; Texas; Utah; Vermont; Virginia; Washington; West Virginia; Wisconsin and Wyoming.

¹⁶⁷ Kinnevy and Caplan *National Surveys of State Parole Boards: Models of Service Delivery* (University of Pennsylvania, 2008) at 7.

¹⁶⁸ United States Parole Commission (federal offences 1st November 1987; DC Code Offenders 5th August 2000; Uniform Code of Military Justice offenders; transfer-treaty cases 1st November 1987); Delaware Board of Parole (30th June 1990); Indiana Parole Board (discretionary parole before and mandatory parole after October 1977); Kansas Parole Board (1st July 1993); Maine Parole Board (1 May 1976); Mississippi Parole Board (on or after 1st July 1995); North Carolina Post-Release Supervision and Parole Commission (1st October 1994); Ohio Parole Board (1st July 1996); Oregon Board of Parole and Post-Prison Supervision (murder/aggravated murder 1st November 1989); Virginia Parole Board (1st January 1995); Washington State Indeterminate Sentence Review Board (felony offenders 1st July 1984; certain sex offenders 31st August 2001).

2.76 In the United States executive clemency is the equivalent of the royal prerogative of mercy.¹⁶⁹ Executive clemency derives from common law principles but is now enshrined in statute.¹⁷⁰ The grant of clemency may take different forms including the grant of a reprieve, stay, commutation of a death sentence or full pardon.¹⁷¹ It is exercised by the President in respect of federal matters¹⁷² and the state governors in respect of all other matters. Many states allocate some of the clemency power to state pardon boards or similar bodies.¹⁷³ 14 states give the governor sole authority without the advice and/or consent of a board.¹⁷⁴ 10 states allow the governor to make a pardon decision with the non-binding advice of a board.¹⁷⁵ 11 states have a shared power model where the governor sits on the pardon board with other officials or is required to have a recommendation from a board or advisory group.¹⁷⁶ 3 states vest their pardon and parole boards with final pardon decision making authority, by-passing the governor altogether.¹⁷⁷

(5) Canada

2.77 Under the *Canadian Constitution*,¹⁷⁸ criminal law is a matter within the federal legislative competence. Thus, unlike the United States or Australia, Canada has one uniform system of criminal law that applies across Canada.¹⁷⁹ The law regarding homicide is contained in Part VIII of the *Criminal Code*.

2.78 In 1976,¹⁸⁰ the House of Commons passed *Bill C-84* which abolished the death penalty for first and second degree murder and replaced it with a mandatory life sentence.¹⁸¹ Parole eligibility requirements were also established. In the case of first degree murder there is an automatic 25-year period of parole ineligibility.¹⁸² In the case of second degree murder the minimum period of parole ineligibility is 10 years while the maximum is 25 years.¹⁸³ The period of ineligibility is determined by the trial judge¹⁸⁴ who may take into account any jury recommendations on the appropriate length.¹⁸⁵

¹⁶⁹ Harris and Redmond "Executive Clemency: The Lethal Absence of Hope" (Fall, 2007) 3(1) *Criminal Law Brief* 2.

¹⁷⁰ Harris and Redmond "Executive Clemency: The Lethal Absence of Hope" (Fall, 2007) 3(1) *Criminal Law Brief* 2 at 2.

¹⁷¹ Harris and Redmond "Executive Clemency: The Lethal Absence of Hope" (Fall, 2007) 3(1) *Criminal Law Brief* 2 at 8.

¹⁷² Section 2 of Article 2 of the *United States Constitution*: "The President shall ... have Power to Grant Reprieves and Pardons for Offenses against the United States, except in cases of Impeachment."

¹⁷³ Harris and Redmond "Executive Clemency: The Lethal Absence of Hope" (Fall, 2007) 3(1) *Criminal Law Brief* 2 at 8.

¹⁷⁴ Alabama; California; Colorado; Kansas; Kentucky; New Jersey; New Mexico; New York; North Carolina; Oregon; South Carolina; Virginia; Washington and Wyoming.

¹⁷⁵ Arizona; Delaware; Florida; Louisiana; Montana; Oklahoma; Pennsylvania and Texas.

¹⁷⁶ Arkansas; Illinois; Indiana; Maryland; Mississippi; Missouri; New Hampshire; Ohio; South Dakota and Tennessee.

¹⁷⁷ Connecticut; Georgia; Idaho and Utah.

¹⁷⁸ Section 91(27) of the *Constitution Act 1867* (UK).

¹⁷⁹ Holland "Murder and Related Issues: An Analysis of the Law in Canada" in *The Law of Murder: Overseas Comparative Studies* (Law Commission, 2005) at 24.

¹⁸⁰ Holland "Murder and Related Issues: An Analysis of the Law in Canada" in *The Law of Murder: Overseas Comparative Studies* (Law Commission, 2005) at 35-36.

¹⁸¹ Section 235(1) of the *Canadian Criminal Code*.

¹⁸² Section 745(a) of the *Canadian Criminal Code*.

¹⁸³ Section 745(b), section 745(b.1) and section 745(c) of the *Canadian Criminal Code*.

¹⁸⁴ Section 745.4 of the *Canadian Criminal Code*.

2.79 Once the prisoner serves the period of parole ineligibility he or she may apply to the Parole Board for parole. The Parole Board will consider whether there are any risks to the public in releasing the prisoner. If released the prisoner is subject to parole conditions and parole may be revoked if he or she violates those conditions or commits a new offence.

2.80 In Canada,¹⁸⁶ the power to exercise the royal prerogative of mercy was delegated to the Governor General.¹⁸⁷ The responsibility for the administration of the royal prerogative of mercy has been delegated to the Solicitor General of Canada in accordance with the *Corrections and Conditional Release Act 1992*. This aspect of the Solicitor General's role is carried out by the clemency division of the National Parole Board.¹⁸⁸

2.81 Trotter makes the following observation in relation to the royal prerogative of mercy under Canadian law:

“The Anglo-Canadian historical conception of RPM [Royal Prerogative of Mercy] has conflated this distinction. The RPM has been used to lessen punishment for reasons of pity and compassion, as well as for reasons related to guilt or innocence of the individual.”¹⁸⁹

Both the compassionate and error-correction aspects of the royal prerogative of mercy have been enshrined in various legislative provisions.¹⁹⁰ Section 748 of the *Criminal Code* provides that the royal prerogative of mercy may be extended to any person sentenced to a term of imprisonment¹⁹¹ and that a *free pardon* or *conditional pardon* may be granted to any person convicted of an offence.¹⁹² Section 748.1 provides that an individual may obtain an order for remission of a fine or forfeiture imposed under any Act of Parliament. An individual who is granted a *free pardon* is deemed never to have committed the offence in respect of which the pardon was granted.¹⁹³ An individual who is granted a conditional pardon must satisfy certain conditions before it takes effect.¹⁹⁴ Remission is likely to be based on the perceived harshness of the original sentence and brings the original sentence to an end. Section 749 of the *Criminal Code* preserves the historical role of mercy at common law. The *Criminal Records Act 1985* provides for a distinct mechanism operated by the National Parole Board whereby the stigma of a criminal conviction may be removed. Section 4 provides that a convicted individual may apply for a pardon 10 years after completing a sentence for a serious personal injury offence, five years after completing a sentence for an indictable offence and three years after completing a sentence for a summary offence. To qualify for a pardon the offender must be of good behaviour during the intervening period and avoid conviction under federal legislation.¹⁹⁵ In addition, section 696.1(1) of the *Criminal Code* provides that an

¹⁸⁵ Section 745.2 of the *Canadian Criminal Code*.

¹⁸⁶ Trotter “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review” (2000-2001) 25 Queen’s LJ 339; Factsheet: Royal Prerogative of Mercy (Parole Board of Canada, January 2001) accessed at http://www.pbc-clcc.gc.ca/infocntr/factsh/man_14faq-eng.shtml on 15.03.11.

¹⁸⁷ Paragraph II and paragraph XII of the *Letters Patent Constituting the Office of the Governor General in Canada 1947*.

¹⁸⁸ Trotter “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review” (2000-2001) 25 Queen’s LJ 339 at 351.

¹⁸⁹ Trotter “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review” (2000-2001) 25 Queen’s LJ 339 at 346.

¹⁹⁰ Trotter “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review” (2000-2001) 25 Queen’s LJ 339 at 348.

¹⁹¹ Section 748(1) of the *Canadian Criminal Code*.

¹⁹² Section 748(2) of the *Canadian Criminal Code*.

¹⁹³ Section 748(3) of the *Criminal Code*.

¹⁹⁴ Trotter “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review” (2000-2001) 25 Queen’s LJ 339 at 358.

¹⁹⁵ Section 9 of the *Criminal Records Act 1985*.

application for ministerial review on the grounds of miscarriage of justice may be made to the Minister for Justice.¹⁹⁶ If the Minister considers that there is a reasonable basis to conclude that a miscarriage of justice occurred, he or she may direct that a new trial be had or refer the matter to the court of appeal.¹⁹⁷

(6) Australia

2.82 In Australia, the death penalty for murder was abolished on a jurisdiction-by-jurisdiction basis.¹⁹⁸ In 1922 Queensland¹⁹⁹ became the first jurisdiction to abolish the death penalty for murder and in 1984 Western Australia²⁰⁰ became the last.²⁰¹ The Commonwealth of Australia²⁰² abolished the death penalty in respect of all federal offences in 1973.²⁰³ Section 3 of the *Death Penalty Abolition Act 1973* stated that the Act applied to the laws of the Commonwealth, the Territories and the Imperial Acts.²⁰⁴

2.83 Today, the penalty for murder varies from jurisdiction to jurisdiction.²⁰⁵ In five jurisdictions - the Commonwealth of Australia,²⁰⁶ the Australian Capital Territory,²⁰⁷ New South Wales,²⁰⁸ Tasmania²⁰⁹ and Victoria²¹⁰ - the life sentence is a *maximum* rather than a *mandatory* penalty.²¹¹ In four jurisdictions - the

¹⁹⁶ Section 691.1 replaced section 690. Trotter observes that the error-correction aspect of mercy was founded in section 690 which referred to an “application for the mercy of the Crown”. See Trotter “Justice, Politics and the Royal Prerogative of Mercy: Examining the Self-Defence Review” (2000-2001) 25 Queen’s LJ 339. The reference to the “mercy of the Crown” has been omitted from section 691.1.

¹⁹⁷ Section 696.3(3)(a) of the *Canadian Criminal Code*.

¹⁹⁸ Potas and Walker “Capital Punishment” *Trends and Issues in Crime and Criminal Justice No. 3* (Australian Institute of Criminology, 1987);

¹⁹⁹ Section 2 of the *Criminal Code Amendment Act 1922*.

²⁰⁰ *Acts Amendment (Abolition of Capital Punishment) Act 1984*.

²⁰¹ Section 5(b) of the *Crimes (Amendment) Act 1955* (NSW); section 5A of the *Statutes Amendment (Capital Punishment Abolition) Act 1976* (SA); section 4 of the *Criminal Code Act 1968* (T); section 2 of the *Crimes (Capital Offences) Act 1975* (V).

²⁰² *Sentencing of Federal Offenders*, Issues Paper 29 (Australian Law Reform Commission, 2005) at paragraph 2.3. State and territory criminal laws cover the vast majority of conduct that requires the censure of the criminal law.

²⁰³ Section 4 of the *Death Penalty Abolition Act 1973* (CW).

²⁰⁴ It thus abolished the death penalty in all jurisdictions including the Australian Capital Territory and Northern Territory.

²⁰⁵ Leader-Elliott “Fault Elements in Murder - A Summary of Australian Law” in *The Law of Murder: Overseas Comparative Studies* (Law Commission, 2005) at 7-8.

²⁰⁶ Divisions 71.2, 115.1, 268.8 and 268.70 of the *Criminal Code Act 1995* (CW).

²⁰⁷ Section 12(2) of the *Crimes Act 1900* (ACT).

²⁰⁸ Section 18(1) of the *Crimes Act 1900* (NSW).

²⁰⁹ Section 158 of the *Criminal Code Act 1924* (T).

²¹⁰ Section 3 of the *Crimes Act 1958* (V).

²¹¹ Dr Anderson argues that labelling life sentences as “mandatory” is misleading. See Anderson “Informing the Public about Sentencing” delivered at the Sentencing Conference 2010, Canberra 6th and 7th February 2010, accessed at <http://njca.anu.edu.au/Professional%20Development/programs%20by%20year/2010/Sentencing%202010/Papers/Anderson.pdf> on 16th February 2011.

Northern Territory,²¹² Queensland,²¹³ South Australia²¹⁴ and Western Australia²¹⁵ - the life sentence is a *mandatory* penalty for murder.

2.84 In all jurisdictions the sentencing court is permitted or required to set a non-parole period²¹⁶ that will, in normal circumstances, result in release before the entire sentence is served.²¹⁷ Leader-Elliott observes that in most, if not all, jurisdictions the courts are under continuing governmental pressure to increase the severity of sentences.²¹⁸ In some jurisdictions, the judicial discretion to specify a parole date or the length of the non-parole period is increasingly circumscribed by legislative guidelines or criteria.

2.85 Each State determines the manner with which applications for the exercise of the royal prerogative of mercy are dealt.²¹⁹ The common law power of pardon is exercised by the State Governors, or other relevant executive body, who may issue a pardon or refer the case to the Court of Appeal.²²⁰ The pardon relieves the individual from the consequences of the conviction but does not operate as an exoneration. The cases referred to the Court of Appeal are reconsidered subject to appellate restrictions regarding the consideration of evidence. New South Wales provides for review by the Supreme Court.²²¹ Western Australia provides that persons convicted of murder may not be pardoned where the court has ordered that the offender never be released under section 90(1)(b) of the *Sentencing Act 1995*.²²²

(7) New Zealand

2.86 In New Zealand, section 2 of the *Crimes Amendment Act 1941* abolished the death penalty for murder and replaced it with life imprisonment with hard labour. The penalty for murder was revised in 1961 when section 172(1) of the *Crimes Act 1961* replaced life imprisonment with hard labour with life imprisonment.²²³ Section 172(2) stipulates that section 172(1) be read in conjunction with section 102 of

²¹² Section 157 of the *Criminal Code Act (NT)*, as amended by section 17 of the *Criminal Reform Amendment Act (No. 2) 2006* (NT).

²¹³ Section 305 of the *Criminal Code Act 1899* (QL).

²¹⁴ Section 11 of the *Criminal Law Consolidation Act 1935* (SA).

²¹⁵ Section 279 of the *Criminal Code Act Compilation Act 1913* (WA).

²¹⁶ The “non-parole period” is equivalent to the “minimum term”.

²¹⁷ Sections 19AB to 19AK of the *Crimes Act 1914* (CWA); section 65 of the *Crimes (Sentencing) Act 2005* (ACT); section 44 of the *Crimes (Sentencing Procedure) Act 1999* (NSW); section 53A of the *Sentencing Act* (NT); section 181 of the *Corrective Services Act 2006* (QL) and section 305 of the *Criminal Code Act 1899* (QL); section 32 of the *Criminal Law (Sentencing) Act 1988* (SA); section 18 of the *Sentencing Act 1997* (T); section 11 of the *Sentencing Act 1991* (V); section 90 of the *Sentencing Act 1995* (WA).

²¹⁸ Leader-Elliott “Fault Elements in Murder - A Summary of Australian Law” in *The Law of Murder: Overseas Comparative Studies* (Law Commission, 2005) at 7.

²¹⁹ Section 313 (remission), section 314A (pardon) and section 314A (prerogative of mercy) of the *Crime (Sentence Administration) Act 2005* (ACT); Section 21D of the *Crimes Act 1914* (CW); Section 76 to section 79 of the *Crimes (Appeal and Review) Act 2001* (NSW); Section 431 of the *Criminal Code Act* (NT); Section 18 and section 672A of the *Criminal Code Act 1899* (QL); Section 369 of the *Criminal Law Consolidation Act 1935* (SA); Section 419 of the *Criminal Code Act 1924* (T); Section 584 of the *Crimes Act 1958* (V); Section 137 to section 142 of the *Sentencing Act 1995* (WA).

²²⁰ Weathered “Pardon Me: Current Avenues for the Correction of Wrongful Conviction in Australia” (2005-2006) 17(2) *Current Issues in Crim Just* 203 at 212; Section 61 of the Australian Constitution; Section 7(1) and section 7(2) of the *Australia Act 1986*.

²²¹ Section 76 to section 79 of the *Crimes (Appeal and Review) Act 2001* (NSW).

²²² Section 142 of the *Sentencing Act 1995*.

²²³ Section 3 of the *Abolition of the Death Penalty Act 1989* abolished the death penalty in respect of treason while section 5 abolished it in respect of treachery in the armed forces.

the *Sentencing Act 2002*,²²⁴ as amended.²²⁵ Section 102 of the *Sentencing Act 2002* indicates that the penalty of life imprisonment is a presumptive penalty. Thus a person convicted of murder must be sentenced to life imprisonment unless the circumstances of the offence and the offender would render such a sentence “manifestly unjust”.²²⁶ If a court does not impose a sentence of life imprisonment it must give written reasons for not doing so.²²⁷ Section 102(3) stipulates that section 102 be read in conjunction with section 86E(2) of the *Sentencing Act 2002*. Section 86E(2)(a) of the 2002 Act provides that the court must impose a life sentence where the murder is a stage-2 or stage-3 offence.²²⁸ Furthermore, section 86E(b) provides that the court must order that the life sentence be served without parole unless the circumstances of the offence and the offender would render such a sentence “manifestly unjust”.

2.87 Regarding parole, section 20 of the *Parole Act 2002* provides that offenders serving life sentences become eligible for parole once they have served 10 years imprisonment, unless the sentencing court has ordered a “non-parole period”.²²⁹ If a non-parole period has been ordered, offenders become eligible for parole once they have served that period. Section 60 of the *Parole Act 2002* provides that an application may be made to the Parole Board to recall an offender who is on parole or compassionate release. This may be done where the offender poses “an undue risk” to the community, has breached a condition of release or has committed an offence punishable by imprisonment.²³⁰ In addition to parole, section 41 of the *Parole Act 2002* provides that the Parole Board may grant compassionate release to any prisoner who has just given birth or is seriously ill and unlikely to recover.²³¹

2.88 In New Zealand the prerogative of mercy is exercised by the Governor-General.²³² The Governor-General may exercise the prerogative of mercy by granting a *free pardon*, which wipes the conviction and sentence;²³³ a *pardon subject to conditions*, which substitutes one form of sentence for another but leaves the conviction standing; respite of the execution of sentence, which reduces the sentence without changing its nature; and remitting in whole or in part any sentence, penalty or forfeiture.²³⁴ In addition, section 406 of the *Crimes Act 1961* provides that the Governor-General may refer the question of the applicant’s conviction or sentence to the Court, or to seek the Court of Appeal’s assistance on any point arising in a case.

F Conclusions and Provisional Recommendations

(1) Extension of the mandatory sentence

²²⁴ For a critique of the *Sentencing Act 2002* see Roberts “Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002” (2003) *Australian and New Zealand Journal of Criminology*; accessed at http://findarticles.com/p/articles/mi_hb3370/is_3_36/ai_n29057975/ on 25th January 2011.

²²⁵ Part 1 of the *Sentencing and Parole Reform Act 2010*.

²²⁶ Section 102(1) of the *Sentencing Act 2002*.

²²⁷ Section 102(2) of the *Sentencing Act 2002*.

²²⁸ See section 86A to section 86I of the *Sentencing Act 2002* regarding the classification of offences as “stage-1”, “stage-2” and “stage-3” offences; the recording of judicial warnings; and the additional consequences for repeated serious violent offending.

²²⁹ See section 84 and section 85 of the *Parole Act 2002* regarding “non-parole periods”.

²³⁰ Section 61 of the *Parole Act 2002*.

²³¹ Section 41(1) of the *Parole Act 2002*.

²³² Trendle “The Royal Prerogative of Mercy - A Review of New Zealand Practice” (Ministry of Justice, 2003); Article 11 of the *Letters Patent Constituting the Office of Governor-General*.

²³³ Section 407 of the *Crimes Act 1961*. By contrast to the position in England, a pardon is not granted on the basis that the Executive accepts that the convicted person committed the offence but forgives him or her.

²³⁴ Article 11 of the *Letters Patent Constituting the Office of Governor-General*.

2.89 There have been recent calls for the Oireachtas to enact mandatory sentencing provisions in respect of certain crimes other than murder, namely, crimes against vulnerable people.²³⁵ It is clear that these calls contemplate custodial rather than non-custodial sentences. The fact that these calls were made in the aftermath of an apparent spate of burglaries committed against elderly home-owners is significant. It is natural that such crimes should inspire public moral outrage and a heightened desire to protect the most vulnerable members of society.

2.90 It is clear from the case law that the Oireachtas is entitled to enact mandatory sentencing provisions in respect of crimes other than murder.²³⁶ In *Whelan and Another v Minister for Justice, Equality and Law Reform*,²³⁷ for instance, the Supreme Court stated that the Oireachtas could “choose in particular cases to impose a fixed or mandatory penalty for a particular offence”. The only proviso to which this was subject was that there should be a “rational relationship” between the mandatory penalty and the offence. In the earlier decision of *State (P Woods) v Attorney General*²³⁸ Henchy J had spoken of the right of courts to select and impose the sentence where a selection was to be made.²³⁹ Indeed, in *Deaton v Attorney General*²⁴⁰ Ó Dálaigh CJ had gone even further by stating that:

“It is common ground that it is for the Legislature, when it creates an offence, to prescribe what punishment shall attach to the commission of such offence. It is also common ground that the Legislature may for a particular offence prescribe a single or fixed penalty, or a maximum penalty, or a minimum penalty, or alternative penalties, or a range of penalties.”²⁴¹

2.91 The question arises, however, as to whether it would be advisable for the Oireachtas to extend the use of mandatory sentences to crimes other than murder.

2.92 First, it should be recalled that the mandatory life sentence for murder is, unquestionably, the most severe criminal sanction available in Ireland. This severity derives from the combination of two aspects of the sanction - its mandatory nature and its life-long duration. It makes sense, therefore, that such a sanction should replace the former sanction for murder - the death penalty. Indeed, this is what happened in Ireland and in virtually all other countries which abolished the death penalty. And now, more than ever, it would seem that there is a strong argument that the principle of proportionality requires the mandatory life sentence to be exclusively reserved for the crime of murder - a crime perceived to be alone at the top of the criminal calendar. The question should thus be whether either aspect of the mandatory life sentence - its mandatory nature or its life-long duration - could be used in isolation to deal with other crimes.

2.93 Let us first consider mandatory sentences. In support of mandatory sentences, it is often argued that mandatory sentences, by prescribing the (minimum) level of punishment to be imposed in all cases, guarantee that offenders convicted of certain offences will always receive appropriate punishment. It is also argued that mandatory sentences, by increasing the certainty and severity of punishment, deter offenders from re-offending and others from committing the same or similar offences. Before deciding whether these arguments are sufficiently compelling to justify the introduction of mandatory sentences in respect of offences other than murder, the Commission observes, however, that mandatory sentences also attract a number of criticisms.

²³⁵ The Commission acknowledges that the reference to “mandatory sentencing” might have been meant to include “presumptive sentencing”.

²³⁶ For a contrary view, see O’Malley “Sentencing Murderers: The Case for Relocating Discretion” (1995) 5(1) ICLJ 31; and Cooney “Criminal Due Process and the Definition of Crime” (June, 1983) *Gazette of the Incorporated Law Society of Ireland* 117.

²³⁷ [2010] IESC 34.

²³⁸ [1969] IR 385.

²³⁹ [1969] IR 385, 403-404.

²⁴⁰ [1963] IR 170.

²⁴¹ [1963] IR 170, 181.

2.94 As against mandatory sentences, it is, first, argued that mandatory sentencing regimes tend to overhaul and replace existing sentencing policy and practices which have been developed over time. It is thus common for there to be resistance to their application.

2.95 Second, it is argued that mandatory sentences preclude judicial discretion and thus, inevitably, give rise to disproportionate sentencing. The courts must impose the sentence prescribed and may not have regard to any mitigating factors. As a result, all offenders, irrespective of their level of culpability or personal circumstances, are subject to the same level of punishment.

2.96 Third, on a related note, mandatory sentences do not provide offenders with any incentive to plead guilty. As a result, court proceedings regarding offences attracting a mandatory sentence are likely to take longer and cost more. Furthermore, because of the severe consequences which would flow from a finding of guilt, it is like that there would be an increase in the number of appeals.

2.97 Fourth, it is argued that mandatory sentences cause sentencing discretion to be transferred from the courts to prosecutors. Thus prosecutors rather than courts decide, by means of the charge preferred, whether a mandatory sentencing regime should or should not apply. Any negotiations regarding the charge to be preferred, and thus the sentencing regime to be applied, take place behind closed doors. This is problematic terms of the constitutional doctrine of the separation of powers and, potentially, Article 34 which requires that justice be administered in public.

2.98 Fifth, the mandatory sentence for murder is a one-strike rule in so far as it applies to first-time offenders. If a one-strike rule has been contemplated in respect of crimes against vulnerable persons it is severe by comparison to the two-strike and three-strike rules in other countries. The experience of these countries has been that the mandatory sentencing regimes have been applied unevenly, primarily because of measures taken to avoid their application.

2.99 Sixth, because of the severe consequences which would flow from a mandatory sentencing regime, it is likely that criminal bosses would distance themselves from the offensive behaviour. It is thus likely that those who would be caught by the mandatory sentence regime would be disposable and replaceable, being at the lower end of the criminal ladder. As a result, the mandatory sentencing regime would have little impact on the overall incidence of the offence.

2.100 Seventh, it has been observed that the factor which triggers the operation of a mandatory sentence should be clearly defined and unequivocal.²⁴² In this regard, it may be noted that "victim vulnerability" is not likely to be a factor capable of clear and unequivocal definition. As a result, it would be difficult, if not impossible, to distinguish between those cases to which the mandatory regime should apply and those to which the regular sentencing regime should apply. There is thus a high risk that the application of such a mandatory regime would give rise to disproportionate and inconsistent sentencing.

2.101 The fact that a victim was vulnerable is undoubtedly an important factor. However, it might be more appropriate to take account of it as a factor which aggravates the seriousness of the offence.

2.102 Eighth, it has been observed that mandatory sentences are often an attempt to eliminate a particular type of offence. It has been argued, however, that mandatory sentences are not a sufficiently sophisticated response to the myriad complex social issues which contribute to many offences. Thus, while a mandatory sentence might ensure the punishment of one offender, it is unlikely to have an impact on the overall incidence of the offence.

2.103 Ninth, on a related note, having regard to the particular link between social deprivation and crime, it has been noted that mandatory sentences tend to disproportionately affect certain socio-economic and ethnic groups.

2.104 Tenth, it has been argued that mandatory sentencing regimes are only justifiable where they can be shown to be better than the existing sentencing regime. The Commission observes that the existing regime is by no means a lenient one. A person convicted of burglary may be punished by a fine, a maximum term of 14 years' imprisonment or both,²⁴³ while a person convicted of aggravated burglary²⁴⁴

²⁴² O'Malley "Further Observations on DPP v Connolly" 22 February 2011 Ex Tempore blog.

²⁴³ Section 12 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

may be punished by a maximum sentence of life imprisonment.²⁴⁵ Furthermore, where the victim is vulnerable it is likely that the courts will take this into account as an aggravating factor.²⁴⁶

2.105 Eleventh, on a related note, it has been argued that mandatory sentences are not a cost-effective response to crime. In this regard, it has been asserted that revenue would be better invested in improving the existing sentencing regime than in introducing a mandatory sentencing regime. This, in turn, affects the extent to which imprisonment can deliver on the principles and purposes of sentencing, outlined in Chapter 1, in particular, rehabilitation.

2.106 Twelfth, it has been argued that mandatory sentences result in more people being sent to prison for longer periods of time. The Commission notes that this argument is particularly relevant in Ireland where the prison system is acutely overcrowded and under-resourced.

2.107 Thirteenth, the deterrent effect of mandatory sentences has been questioned. While mandatory sentences generally increase the severity of punishment, due to the measures taken to avoid their application, they generally do not increase the certainty of punishment. Certainty and severity of punishment are considered to be prerequisites to deterrence.

2.108 Finally, it has been argued that mandatory sentences may be too rigid to evolve with changing penal policy and developments in sentencing. They thus become subject to myriad amendments. A more flexible format for sentencing offenders would be desirable.

2.109 While a comparative analysis of common law countries which have introduced mandatory sentencing regimes is of interest, the Commission cautions against relying too heavily on their example. In this regard, it may be observed that the rationale for introducing mandatory sentencing regimes varies from country to country but, for the most part, has been a reactionary response to particularly egregious incidents, heinous crimes or persistent criminality. While there has been near universal acceptance of mandatory sentencing for drugs and firearms offences, only some countries have extended the use of mandatory sentencing to burglary and even fewer states in the US have extended the use to specific offences committed against vulnerable people. No country has introduced mandatory sentencing for non-specified crimes committed against vulnerable people.

(2) The mandatory sentence for murder and a specific minimum term at sentencing stage

2.110 The Commission has considered the only examples of entirely mandatory sentences in the Irish sentencing system, namely, the mandatory life sentence for murder, under section 2 of the *Criminal Justice Act 1990*, and the mandatory life sentence for murder of designated persons, under section 4 of the *Criminal Justice Act 1990*. In this regard, the Commission has observed that entirely mandatory sentences are applicable only to an offence considered to be at the highest end of the criminal calendar, namely, murder, and to which the death penalty would have formerly applied. The Commission considers that a mandatory life sentence for such a limited group of serious offences is consistent with the aims of criminal sanctions and the sentencing principles discussed in Chapter 1.

2.111 Having regard, however, to the general aims and principles (set out in Chapter 1), and more particularly to the decisions of the European Court of Human Rights concerning the European Convention on Human Rights (discussed in this Chapter), specific aspects of the current mandatory sentencing regime for murder are open to question on at least two grounds. First, the mandatory life sentence applies to all persons convicted of murder regardless of his or her particular circumstances or the particular circumstances of the case. In this respect, once imposed, it is unclear – bearing in mind the possibility of release by the Minister for Justice (on foot of a recommendation of the Parole Board) – how long a person serving a mandatory life sentence will, in fact, spend in prison. Second, having regard to

²⁴⁴ Section 13(1) *Criminal Justice (Theft and Fraud Offences) Act 2001* provides that a person is guilty of aggravated burglary if he or she commits any burglary and at the time has with him or her any firearm or imitation firearm, any weapon of offence or any explosive.

²⁴⁵ Section 13 of the *Criminal Justice (Theft and Fraud Offences) Act 2001*.

²⁴⁶ See *R v McInerney* [2003] 2 Cr App R (S) 39, p 240; Sentencing Advisory Panel Guideline on Burglary; and *People (DPP) v Mullen* Court of Criminal Appeal 17 December 2002.

the decisions of the European Court of Human Rights, it is difficult to see how a decision regarding release that is made by the Executive without any input from the sentencing court, often many years after the decision regarding sentencing has been made, is fully compatible with the European Convention on Human Rights. For these reasons, the Commission has provisionally concluded, and so recommends, that the mandatory sentencing regime for murder should be amended to provide that, on the date of sentencing, the court should be empowered to indicate or recommend that a minimum specific term of imprisonment should be served by the defendant, having regard to the particular circumstances of the offence and of the offender.

2.112 The Commission provisionally recommends that, while the use of the entirely mandatory sentence may, having regard to the aims of criminal sanctions and the principles of sentencing, be appropriately applied to the offence of murder, the mandatory sentencing regime for murder should be amended to provide that, on the date of sentencing, the court should be empowered to indicate or recommend that a minimum specific term of imprisonment should be served by the defendant, having regard to the particular circumstances of the offence and of the offender.

CHAPTER 3 MANDATORY MINIMUM SENTENCES SUBJECT TO EXCEPTIONS

A Introduction

3.01 This Chapter considers those provisions which provide for a mandatory minimum sentence subject to exceptions in specified circumstances. There are two examples of this type of provision in Irish law. One provides the penalty for certain offences under the *Misuse of Drugs Act 1977*¹ and the other provides the penalty for certain offences under the *Firearms Acts*. In this Chapter, the Commission discusses the history of these provisions, their application in practice and their effect, against the general background of the aims and principles set out in Chapter 1.

B Offences under the Misuse of Drugs Act 1977

(1) History

3.02 Initially the *Misuse of Drugs Act 1977* provided for the sole offence of possessing a controlled drug for the purpose of sale or supply,² which attracted a fine and/or a maximum term of imprisonment of 14 years.³ In an effort to combat the worsening drug problem,⁴ the Government enacted the *Misuse of Drugs Act 1984* which, among other matters, increased the maximum term to life imprisonment.⁵

3.03 In 1999 the *Misuse of Drugs Act 1977* was once again amended when the *Criminal Justice Act 1999* inserted section 15A⁶ and amended section 27.⁷ The effect was to create a new offence of possessing controlled drugs having a value of £10,000 or more,⁸ for sale or supply which attracted a presumptive sentence of 10 years.⁹ Section 27(3C) provided that the presumptive sentence would not apply where there were “exceptional and specific circumstances”:

“Subsection (3B) of this section shall not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years imprisonment unjust in all the circumstances...”

¹ Section 15A and section 15B of the *Misuse of Drugs Act 1977*.

² Section 15 of the *Misuse of Drugs Act 1977*.

³ Section 27(a) of the *Misuse of Drugs Act 1977* provided that an offender, on summary conviction, would be liable to a fine of £250 and/or a maximum term of 12 months and section 27(b) provided that an offender, on indictment, would be liable to a maximum fine of £3,000 and/or a maximum term of 14 years.

⁴ Criminal Justice (Drug Trafficking) Bill 1996: Committee Stage, Select Committee on Legislation and Security Debate, Tuesday, 18 June 1996, Mr John O'Donoghue TD.

⁵ Section 6 of the *Misuse of Drugs Act 1984* inserted a new section 27 into the *Misuse of Drugs Act 1977*. Section 27(3)(a) provided that an offender, on summary conviction, would be liable to a maximum fine of £1,000 and/or a maximum term of 12 months and section 27(3)(b) provided that an offender, on indictment, would be liable to a fine of such amount as the court considers appropriate or a maximum term of life imprisonment or a fine and a lesser period of imprisonment.

⁶ Section 4 of the *Criminal Justice Act 1999*.

⁷ Section 27(3B) inserted by section 5 of the *Criminal Justice Act 1999*.

⁸ Section 1 of the *Euro Changeover (Amounts) Act 2001* converted this amount to €13,000.

⁹ *Irish Current Law Statutes Annotated 1999* at 10-05.

3.04 It is clear that the language used in the *Criminal Justice Act 1999* was influenced to a great extent by the language used in the *Crime (Sentences) Act 1997*. Section 3 of the 1997 Act, which stipulates the presumptive minimum penalty for a third class A drug trafficking offence, provides:

“The court shall impose a custodial sentence for a term of at least seven years except where the court is of the opinion that there are specific circumstances which -

(a) relate to any of the offences or to the offender; and

(b) would make the prescribed custodial sentence unjust in all the circumstances.”¹⁰

It suffices to note at this juncture that a parallel debate regarding the use of mandatory minimum sentences had been taking place in the UK at the time the *Criminal Justice (No 2) Bill 1997*, enacted as the *Criminal Justice Act 1999*, was first proposed in Ireland. This debate will be looked at in greater detail in Section D.

3.05 In 2006 the provisions of the *Misuse of Drugs Act 1977* were further refined when the *Criminal Justice Act 2006* amended section 15A,¹¹ inserted section 15B¹² and amended section 27.¹³ Section 15A, as amended, provided that mens rea regarding the value of the drugs was not an element of the offence. Section 15B created the new offence of importing controlled drugs having a value of €13,000 or more which, under section 27, attracted a presumptive sentence of 10 years.

3.06 In 2007 the *Criminal Justice Act 2007* made amendments of a more aesthetic nature. Section 33 of the *Criminal Justice Act 2007* consolidated the numbering of the subsections of section 27. In addition it inserted subsection (3D)(a) which emphasised the social harm caused by drug trafficking:

“The purpose of this subsection is to prove that in view of the harm caused to society by drug trafficking, a court, in imposing sentence on a person (other than a person under the age of 18 years) for an offence under section 15A or 15B of this Act, shall specify a term of not less than 10 years as the minimum term of imprisonment to be served by the person, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of the offence, it would be unjust to do so in all the circumstances.”

3.07 These amendments, particularly those introduced by the *Criminal Justice Act 1999* and the *Criminal Justice Act 2006*, marked an important turning point in the Irish sentencing regime which had until 1999 - with the exception of the sentences for murder and capital murder - accorded primacy to judicial discretion in the determination of sentences. Against the backdrop of an escalating drugs problem and a growing realisation that Ireland had become a portal not only to the Irish drugs market but also to the British and European drugs markets,¹⁴ the Oireachtas introduced the presumptive minimum sentences to address an apparent rift which had developed between legislative intent and judicial execution.

3.08 Drug misuse and drug trafficking had proved to be longstanding and persistent problems.¹⁵ In the late 1960s young people had begun to experiment with soft drugs but the situation deteriorated when, in the early 1980s, intravenous heroin use was introduced. In addition to the problem of substance addiction this gave rise to increased criminality and a greater incidence of HIV/AIDS and Hepatitis B and C.¹⁶ Vast quantities of illicit drugs were being intercepted at Ireland’s frontiers. In November 1995 the

¹⁰ Section 3(2) of the *Crime (Sentences) Act 1997*.

¹¹ Section 81 of the *Criminal Justice Act 2006*.

¹² Section 82 of the *Criminal Justice Act 2006*.

¹³ Section 84 of the *Criminal Justice Act 2006*.

¹⁴ Burke “Rabbitte Revisited: The First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs - Ten Years On” (2007) 55 Administration 125, 127-132; *First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs 1996* at 6-15 and 25-26.

¹⁵ Burke “Rabbitte Revisited: The First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs - Ten Years On” (2007) 55 Administration 125, 128.

¹⁶ *First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs 1996* at 12.

Garda Síochána made a record seizure of cannabis at Urlingford, County Kilkenny.¹⁷ Despite the size of the seizure and a number of arrests nobody was ever prosecuted. The Government and, indeed, several community groups made numerous attempts to combat the growing drugs problem but to no apparent avail.¹⁸

3.09 In 1995 the Opposition moved a motion requesting the Government to respond to the “drug emergency” by introducing legislation to strengthen the law and penalties for drug importers, distributors and suppliers.¹⁹ It was proposed that the law should reflect a minimum sentence of 10 years for an offence by an importer or pusher.²⁰ An amended version of the motion proposed by the then Minister for Justice, which excluded any reference to strengthening the law and penalties, was adopted.

3.10 In 1996 the Oireachtas enacted the *Criminal Justice (Drug Trafficking) Act 1996* which sought to respond to the issue of drug trafficking by increasing Garda powers. During the Oireachtas debates, the Opposition proposed that the Bill be amended to provide for a minimum sentence of 10 years for drug dealers convicted of possessing, for sale or supply, drugs with a street value of £10,000 or more.²¹ It was asserted that the proposed amendment would address the issue of the courts imposing sentences for drug dealing which were not reflective of the legislative intent behind the *Misuse of Drugs Act 1977*:

“In 1977, the Houses of the Oireachtas provided a maximum sentence for drug pushers of 14 years (*sic*) imprisonment. That was in recognition of a growing drugs subculture in the country. In 1984, the Oireachtas recognised that this problem was getting worse and it increased the maximum sentence from 14 years to life imprisonment.

An examination of sentences handed down by the courts to drug pushers shows that the true intent of the Oireachtas is not being reflected in the sentences imposed on individuals by the courts. The most recent year for which statistics are available is 1993. In that year, 71 people were convicted of possession of a control (*sic*) drug with intent to supply. The following were the sentences imposed by the courts: in three of the cases the sentence handed down was less than three months; in six of the cases the sentence was three to six months; in 20 of the cases the sentence was between six and 12 months; in 29 of the cases the sentence was between one and two years; in four of the cases the sentence was between three and five years; in three of the cases the sentence was between five and ten years; and in 1993, when it was clear that drugs had become a major problem, there was only one case in which the criminal courts imposed a sentence of more than ten years. It is abundantly evident that this sends out the wrong message to drug dealers.”²²

The proposed amendment was defeated.

¹⁷ Adjournment Debate - Importation of Illegal Drugs, Dáil Debates, Vol 458 No 1, Thursday, 9 November 1995; Cusack and Mooney “Pounds 150m Cannabis Haul may have been bound for UK” Irish Times, 9 November 1995; Cleary “Drug Force’s Major Haul probably aimed at UK” Irish Times, 11 November 1995; Maher “Gardaí claim Media Leaks thwarted Attempts to Capture Drugs Barons” Irish Times, 9 December 1995; Editorial “Divisions in Drugs Response” Irish Times, 11 December 1995;

¹⁸ Burke “Rabbitte Revisited: The First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs - Ten Years On” (2007) 55 Administration 125, 129.

¹⁹ Private Members’ Business: Drug Abuse: Motion Dáil Debates, Vol 452 No 8, Tuesday, 16 May 1995, Ms Liz O’Donnell TD, Progressive Democrats Spokesperson for Justice.

²⁰ Private Members’ Business: Drug Abuse: Motion Dáil Debates, Vol 453 No 1, Wednesday, 17 May 1995, Mr Des O’Malley TD.

²¹ Criminal Justice (Drug Trafficking) Bill 1996: Committee Stage, Select Committee on Legislation and Security Debate, Tuesday, 18 June 1996, Mr John O’Donoghue TD, Fianna Fáil Spokesperson for Justice.

²² Criminal Justice (Drug Trafficking) Bill 1996: Committee Stage, Select Committee on Legislation and Security Debate, Tuesday, 18 June 1996.

3.11 In June 1996 Veronica Guerin, an investigative journalist who had written extensively about the criminal figures involved in the drug trade, was assassinated.²³ It was believed that one of the figures being investigated by Ms Guerin was responsible. In the period that followed the murder, the Government came under increased pressure to tackle the drugs problem. In this regard, Burke observes:²⁴

“This murder, which reinforced popular fears that the government had lost control of the illicit drugs scene, seemed to be the catalyst for a range of legislative and policy responses aimed at tackling Dublin’s drug problem and reassuring the public about the government’s determination in this regard.”²⁵

While not everyone was agreed as to the appropriate course of action,²⁶ the Oireachtas responded by enacting the *Proceeds of Crime Act 1996*, arising out of which the Criminal Assets Bureau was established on a statutory basis.²⁷

3.12 In 1997 the *Criminal Justice (No 2) Bill 1997* was introduced²⁸ and enacted as the *Criminal Justice Act 1999*. The Bill proposed to amend the *Misuse of Drugs Act 1977* by creating a new offence of possessing drugs with a value of £10,000 or more with intent to supply, which would attract a minimum sentence of 10 years.²⁹ Elaborating on his rationale for introducing the new offence, the Minister highlighted the “unique nature” of the drugs trade and the retributive and deterrent policies being pursued by the Oireachtas to combat it:

“...[I]n view of the unique nature of the trade in illegal drugs, the great misery inflicted on so many people by those who deal in that deadly trade and to demonstrate ... our commitment as legislators to do all we can to rid us of this scourge, I have provided that in such cases the court must specify that the minimum period of imprisonment to be served upon conviction for the offence shall be at least 10 years. This is undoubtedly a harsh punishment but I am satisfied that it is warranted and proportional. It should send an unequivocal message to those engaged in the

²³ Killing of Dublin Journalist: Statements Dáil Debates, Vol 467 No 5, Wednesday, 26 June 1996; Kennedy “Stunned Political Leaders see Killing as Attack on Democracy” Irish Times 27 June 1996.

²⁴ Maher “Time to move against Freedom of the Criminal” Irish Times 28 June 1996; Cullen “Owen defends Management of the Drug Crisis” Irish Times 28 June 1996; Fitzgerald “Inadequacies of Criminal Law must be tackled” Irish Times 29 June 1996; “The Politics of Crime” Irish Times 29 June 1996; Coghlan “Cool Heads needed to deal with Drugs Issue” Irish Times 29 June 1996.

²⁵ Burke “Rabbitte Revisited: The First Report of the Ministerial Task Force on Measures to Reduce Demand for Drugs - Ten Years On” (2007) 55 Administration 125, 130; “Crime Bosses had to run for Cover after Murder of Journalist” Irish Times 16 March 2001.

²⁶ Browne “Litany of Repressive Measures emanating from the Airwaves is not an appropriate Response” Irish Times 28 June 1996; Walsh “States of Emergency are not the Answer” Irish Times 29 June 1996; “Warnings against extreme Reaction to Murder” Irish Times 2 July 1996; “The Case for a Commission” Irish Times 2 July 1996; “The Response to Organised Crime” Irish Times 3 July 1996; Cusack “Garda unconvinced by Crime Measures” Irish Times 4 July 1996; Holland “Lessons of the Past show Hard Cases make Bad Law” Irish Times 4 July 1996; “The Debate on Crime” Irish Times 6 July 1996.

²⁷ Tynan, Cusack and Maher “Government prepares Crime Package in Wake of Murder” Irish Times 28 June 1996; Tynan and Maher “Owen to accept FF Bill on freezing Assets of Dealers” Irish Times 1 July 1996; Tynan “Coalition to present Anti-Crime Package later Today” Irish Times 2 July 1996; Kenny “Innocent have Nothing to fear from Justice System Reforms” Irish Times 3 July 1996; Tynan “Dáil to debate Six Law Measures” Irish Times 23 July 1996; Kennedy “Cabinet bid to pass Four Bills on Organised Crime Today” Irish Times 25 July 1996.

²⁸ Criminal Justice (No 2) Bill, 1997: Order for Second Stage Seanad Debates, Vol 153 No 1, Tuesday, 9 December 1997.

²⁹ Criminal Justice (No 2) Bill, 1997: Second Stage Seanad Debates, Vol 153 No 1, Tuesday, 9 December 1997.

illegal drugs trade, and to those who might be tempted to engage in it, that we are serious and doing all we can to eradicate this blight.”³⁰

It is interesting to note the difference between this explanation and the explanation proffered for the proposed amendment to the *Criminal Justice (Drug Trafficking) Act 1996* which was, for all intents and purposes, identical to the mandatory sentencing provision in the *Criminal Justice (No 2) Bill 1997*.³¹

3.13 In 2001 the Department of Justice commissioned a report on the criteria applied by the courts in sentencing for offences under section 15A of the *Misuse of Drugs Act 1977*.³² The report concluded that the courts showed a marked reluctance to impose the mandatory minimum sentence of 10 years for fear that it would result in a disproportionate sentence in individual cases. The report, which examined the period between November 1999 and May 2001, observed that a sentence of 10 years or more had been imposed in only three out of 55 cases.

3.14 In 2004 the Government introduced the *Criminal Justice Bill 2004*.³³ During the second stage of debates the Government announced that it would be making a series of substantial amendments to the Bill which would, among other matters, strengthen the presumptive sentencing provisions for drug offences.³⁴ The amendments were finalised in the wake of the fatal shooting of Donna Cleary in March 2006. The shooting had led to public outcry not only because of the senselessness of the act but also because it transpired that one of those suspected to have been involved had been convicted of an offence under section 15A of the *Misuse of Drugs Act 1977* in 1999.³⁵ Had he been sentenced to the “mandatory” term of 10 years rather than a term of 6 years he would have continued to serve his sentence in 2006. The amended Bill thus proposed a number of changes to the law regarding drug offences,³⁶ two of which are relevant to this consultation paper. First, it proposed to create a new offence of importing drugs having a value of €13,000 or more, which would attract a minimum sentence of 10 years. Second, it proposed to strengthen the existing mandatory sentencing provisions for certain drug trafficking offences by obliging the sentencing court to consider evidence of previous drug trafficking convictions. In its final form, the *Criminal Justice Act 2006* made these and other amendments to the *Misuse of Drugs Act 1977*.

3.15 First, it amended section 15A by inserting subsection (3A).³⁷ Section 15A(3A) clarified that mens rea regarding the value of the drugs involved was not an element of the offence. Thus the prosecution needed only to establish that the accused knew that he or she was in possession of drugs with intent to sell or supply and not that he or she knew the value of the drugs involved. As section 15A(3A) could not apply retrospectively, however, a question arose as to the burden of proof to be discharged by the prosecution in proceedings brought before the section’s commencement date.³⁸ The question was answered in *People (DPP) v Power*³⁹ when the Supreme Court ruled that section 15A did not require the prosecution to establish mens rea regarding the value of the drugs. In that case the trial

³⁰ Criminal Justice (No 2) Bill, 1997 [Seanad]: Second Stage Dáil Debates, Vol 492 No 3, Thursday, 11 June 1998.

³¹ See paragraph 3.10.

³² McEvoy *Research for the Department of Justice on the Criteria applied by the Courts in sentencing under S. 15A of the Misuse of Drugs Act 1977 (as amended)* (Department of Justice, 2001).

³³ Criminal Justice Bill 2004: Second Stage Dáil Debates, Vol 597 No 5, Tuesday, 15 February 2005.

³⁴ Criminal Justice Bill 2004: Second Stage Dáil Debate, Vol 597 No 5, Tuesday, 15 February 2005.

³⁵ “Mandatory Drug Offence Terms rarely imposed” Irish Times 7 March 2006; Lally and Reid “Sentences for Drugs, Gun Crimes questioned after Killing” Irish Times 7 March 2006; Browne “Now that would be a Watershed” Irish Times 8 March 2006.

³⁶ Criminal Justice Bill 2004: Motion Dáil Debates, Vol 617 No 97, Tuesday, 28 March 2006.

³⁷ Section 81 of the *Criminal Justice Act 2006*.

³⁸ 1 August 2006; *Irish Current Law Statutes Annotated 2006* at 26-79.

³⁹ [2007] 2 IR 509.

judge had refused the defence's request to direct the jury that mens rea as to the value of the drugs was a necessary element of the offence. On appeal, the Court of Criminal Appeal upheld the trial judge's ruling regarding mens rea.⁴⁰ Refusing leave to appeal the Court of Criminal Appeal did, however, certify the issue as a point of law of exceptional public importance.⁴¹ Having considered the matter the Supreme Court concluded that:

"...[B]y necessary implication and on its true construction, s. 15A as to the constituents of the offence thereby created relating to the value of the controlled drugs does not require the prosecution to establish knowledge on the part of the accused of the market value of the controlled drugs in question."⁴²

The implication of this was that the new section 15A(3A) had clarified rather than changed the pre-existing law. Even before the insertion of subsection (3A), section 15A had not required the prosecution to establish mens rea regarding the value of the drugs. As a result, a number of earlier decisions which had held that mens rea was an element of the offence were overruled.⁴³

3.16 Second, the *Criminal Justice Act 2006* inserted section 15B⁴⁴ and amended section 27.⁴⁵ The effect was to create a new offence of importing controlled drugs having a value of €13,000 or more, which would be subject to the same penalty provisions as applied to offences under section 15A. Previously, the offence of importing controlled drugs had been provided for in regulations made under section 5 of the *Misuse of Drugs Act 1977*.⁴⁶ Section 5 provided that the Minister for Health and Children could make regulations relating to, among other matters, the importation or exportation of controlled drugs. Regulation 4 of the *Misuse of Drugs Regulations 1988* prohibited the importation or exportation of a controlled drug other than in accordance with the regulations. Section 27(6) of the *Misuse of Drugs Act 1977* provided that importation or exportation in contravention of the regulations was punishable by a fine or term of imprisonment, not exceeding 14 years, or both. The then Minister for Justice observed:

"In contrast, the corresponding penalty for possession of controlled drugs for unlawful sale or supply is a fine of such amount as the court considers appropriate and imprisonment for life. It therefore seems strange that we have a situation whereby importing such drugs carries a penalty of a maximum of 14 years - judges will work back from the maximum - whereas under section 15A the exact opposite situation obtains with regard to certain quantities of drugs for which the judge is supposed to operate between penalties of ten years' jail or life imprisonment, for a very similar offence."⁴⁷

Thus section 27 was amended to ensure that comparable sentences applied to offences under section 15A and section 15B.

3.17 Third, the *Criminal Justice Act 2006* inserted subsection (3CC) into section 27.⁴⁸ Section 27(3CC)⁴⁹ provided that the court, when deciding whether or not the 10-year minimum would be appropriate in a given case, could have regard to (a) any previous drug trafficking convictions and (b) the

⁴⁰ *People (DPP) v Power* Court of Criminal Appeal 22 May 2006.

⁴¹ Section 29 of the *Courts of Justice Act 1924*.

⁴² *People (DPP) v Power* [2007] 2 IR 509, 522.

⁴³ For example see *People (DPP) v Charles Portlaoise* Circuit Court 13 July 2004.

⁴⁴ Section 82 of the *Criminal Justice Act 2006*.

⁴⁵ Section 84 of the *Criminal Justice Act 2006*.

⁴⁶ Criminal Justice Bill 2004: Committee Stage (Resumed) Select Committee on Justice, Equality, Defence and Women's Rights Debate, Thursday, 11 May 2006.

⁴⁷ Criminal Justice Bill 2004: Committee Stage (Resumed) Select Committee on Justice, Equality, Defence and Women's Rights Debate, Thursday, 11 May 2006, Mr McDowell TD.

⁴⁸ Section 84 of the *Criminal Justice Act 2006*.

⁴⁹ Now section 27(3D)(c).

public interest in preventing drug trafficking. While it remained within judicial discretion to determine whether regard should, in actual fact, be had to these factors and the weight to be attributed to them, the Oireachtas's intention to narrow the aperture through which the judiciary could justify the imposition of lesser sentences was clear. The Minister's explanation for inserting subsection (3CC) reinforced this point:

"By enacting the 1999 Act, the Oireachtas gave a clear statement to the Judiciary that convictions for drug offences involving the sale or supply of substantial quantities of drugs should attract significant custodial sentences. The Oireachtas considered a quantity of drugs valued at €13,000 or more, *irrespective of whether they were hard or soft drugs*, to be a substantial quantity meriting a mandatory minimum sentence of not less than ten years (*sic*) imprisonment...

...[T]he wishes of the Oireachtas have not been reflected in practice. For the first five years of its operation, the mandatory minimum sentence was applied in only 6% of convictions. However, its application has recently increased considerably and I understand that for the year 2004, after public controversy grew, the figure was approximately 21%.⁵⁰ [Emphasis added]

3.18 In spite of an acknowledged improvement in the statistics, however, the Minister felt compelled to introduce subsection (3CC) as a "counterweight" to the mitigating factors, which included guilty pleas and cooperation, of which the court could already take account.⁵¹ Whereas the issue of previous convictions attracted little comment, the issue of public interest - to the extent that it might prejudice the rights of the defendant - demanded a fairly detailed justification:

"While sentencing is person-specific at one level, I propose to reintroduce public interest to balance and remind the courts they are supposed to take into account whether something is a repeat offence.

The reference to the public interest should ensure that, for example, the corrosive effects of drugs on our community are taken into account. These are the same irrespective of the circumstances of the offender...

I strongly support a system of justice that takes into account the personal circumstances of the offender being dealt with by the court. It would not be a system of justice if it did not. Nonetheless, the court must say that *even if the offender was effectively Mother Teresa*, it does not matter because people will be shooting up with heroin on the stairs of a flat the next day. *One's circumstances or reasons do not matter as much as the social outcomes*. We are trying to rebalance the issue and make it less personal to the accused. If the court departs from the minimum mandatory sentence, a warning light should flash in the judge's mind, who should ask whether he or she is becoming too specific to the person and forgetting the effect of the offence on society."⁵² [Emphasis added]

The Oireachtas thus indicated that the sentencing regime applicable to certain drug trafficking offences would differ from the regular sentencing regime in so far as it would be less bound to the policy of individualised sentencing. The view of the Oireachtas was that, when deciding whether or not to impose a 10-year minimum sentence in a given case, a court should have the social impact of drug trafficking and

⁵⁰ Criminal Justice Bill 2004: Committee Stage (Resumed) Select Committee on Justice, Equality, Defence and Women's Rights Debate, Thursday, 11 May 2006; It is interesting to note that Minister McDowell's reason for inserting subsection (3CC) - to close the gap between Oireachtas intention and judicial action - was very similar to the reason which had been proffered by Minister O'Donoghue for the introduction of presumptive sentencing in respect of offences under section 15A of the *Misuse of Drugs Act 1977*.

⁵¹ Criminal Justice Bill 2004: Committee Stage (Resumed) Select Committee on Justice, Equality, Defence and Women's Rights Debate, Thursday, 11 May 2006.

⁵² Criminal Justice Bill 2004: Committee Stage (Resumed) Select Committee on Justice, Equality, Defence and Women's Rights Debate, Thursday, 11 May 2006.

view factors, such as the nature of the drugs and the circumstances of the offender, as being of lesser importance.⁵³

3.19 In 2007 the Government introduced the *Criminal Justice Bill 2007* which, as noted at paragraph 3.06, consolidated the numbering of the subsections of section 27 and inserted subsection (3D)(a) which emphasised the social harm caused by drug trafficking.⁵⁴ During the second stage of debates the Minister reiterated the need for consistency in sentencing and indicated that, since “the policy laid out in 1997 has not been adhered to”, there was a need to make this policy more explicit by means of legislation.⁵⁵ It is arguable that this approach did adequately respond to the issue of the minimum term not being applied. At the end of 2007, it was reported that the minimum sentence had been imposed in only three out of 57 cases.⁵⁶

3.20 The move towards a more punitive system of sentencing corresponded to a similar trend which had been developing in the United Kingdom at the same time.⁵⁷ This will be discussed in greater detail in Section D.

(2) Application

3.21 To examine the application of the presumptive sentences applicable to offences under section 15A and section 15B of the *Misuse of Drugs Act 1977* it is necessary to consider first the elements of the offences under section 15A and section 15B and to consider next the relevant penalty provisions under section 27. These will be considered in turn.

(a) Section 15A: Elements of the Offence

3.22 As discussed in paragraph 3.03, section 15A of the *Misuse of Drugs Act 1977* creates the offence of possessing controlled drugs, having a value of €13,000 or more,⁵⁸ with intent to sell or supply. In this section the elements of the offence under section 15A will be considered.

(i) Possession of a Controlled Drug

(1) Possession

3.23 The first element of the offence under section 15A is possession of a controlled drug. While the term “possession” has not been definitively defined, the legal understanding of the term may be distinguished from the common understanding. Whereas the common understanding might equate “possession” with “custody”, the legal understanding identifies “custody” as being one aspect of a more complex theory. In this regard, McAuley and McCutcheon observe that possession comprises control or dominion over goods and knowledge of their existence.⁵⁹ Thus a person may, in legal terms, possess goods regardless of whether or not he or she has custody of them. Where a person has custody and exercises control over goods, he or she is said to have “actual possession” of the goods.⁶⁰ Where, on the other hand, a person does not have custody of the goods but exercises control over them, he or she is

⁵³ Commentators have noted the difficulty in determining what is in the public interest in preventing drug trafficking. See *Irish Current Law Statutes* 2006 at 26-84.

⁵⁴ 13 March 2007.

⁵⁵ Criminal Justice Bill 2007: Second Stage Dáil Debates Vol 634, No 2, Thursday 22 March 2007 Col 383; Donohoe “New Bill to end Judges’ Discretion in serious Drug Cases” *Irish Times* 13 March 2007; “Tougher Sentencing on Way in new Crime Package” *Irish Independent* 13 March 2007; “Ex-Judge knocks new Drug Laws” *Irish Independent* 14 March 2007; O’Mahony “McDowell’s Battle with Judiciary not Justified” *Irish Times* 22 March 2007.

⁵⁶ Lally “Only Three of 57 Drug Dealers got 10-Year Sentence” *Irish Times* 30 October 2007.

⁵⁷ Ashworth “Changes in Sentencing Law” (1997) *Crim LR* 1.

⁵⁸ Section 1 of the *Euro Changeover (Amounts) Act 2001*.

⁵⁹ McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet and Maxwell, 2000) at 208-209.

⁶⁰ McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet and Maxwell, 2000) at 208.

said to have “constructive possession” of the goods. By way of illustration McAuley and McCutcheon refer to the judgment of Davitt P in *Minister for Posts and Telegraphs v Campbell*.⁶¹

“...a person cannot, in the context of a criminal case, be properly said to keep or have possession of an article unless he has control of it personally or by someone else. He cannot be said to have actual possession of it unless he personally can exercise physical control over it; and he cannot be said to have constructive possession of it unless it is in the actual possession of someone over whom he has control so that it would be available to him if and when he wanted it... He cannot properly be said to be in control or possession of something of whose existence and presence he has no knowledge”.⁶²

3.24 Thus, in theory, the term “possession” in section 15A should be broad enough to describe the activities of both the so-called drug barons and drug couriers. On the one hand, the drug barons may be said to exercise constructive possession as they have ultimate control over the drug couriers but will rarely have custody of the drugs. On the other hand, the drug couriers may be said to have actual possession as they have some level of control over the drugs of which they have custody. The reality, however, is that it is easier to detect and prove actual possession than it is to detect or prove constructive possession. As a result, drug couriers are more likely to be caught for offences under section 15A than drug barons.

3.25 The Court of Criminal Appeal considered the element of possession in *People (DPP) v Gallagher*.⁶³ The applicant sought to appeal his conviction on the ground that the evidence did not establish that the accused as a matter of law had ever been in possession of the drugs in question. It was submitted that since the container had been at all times under Garda surveillance, it, together with its contents, had been in the custody and control of the authorities and could not in law, therefore, be considered to have been in the possession of the accused. In rejecting this argument, Murray J stated:

“The word ‘possession’ is a common word of the English language and well known to the law. There are many offences concerning unlawful possession such as those relating to firearms, stolen goods, pornography, lethal weapons, etc. It is a term which may indeed require particular analysis in certain contexts such as where there is an issue of constructive possession. In this case the context is plain. It is one of actual possession. Possession having been taken of the container on delivery, the men in question opened it and proceeded to unload its contents... [T]hey were exercising physical control over the container and its contents. There could not be a clearer case of actual possession. The fact that the gardaí were involved in a close surveillance operation with a view to arresting those involved in the transportation and unloading of the drugs does not take away from these objective facts and does not in law mean that those involved did not at the time of their arrest have possession of the drugs in question... Surveillance operations based on information and intelligence are part and parcel of policing techniques and it would be ludicrous to suggest that such surveillance operations, which closely monitor illegal activity with a view to arresting the culprits, could in some way exculpate such culprits from responsibility for their actions and in particular mean that they did not have possession of that which was de facto in their possession.”

3.26 In *People (DPP) v Goulding*⁶⁴ the Court of Criminal Appeal considered whether there was sufficient evidence to leave the question of possession to the jury. An independent witness had testified to seeing a package being thrown from the passenger side of a car in which the applicant had been the front-seat passenger. The Court of Criminal Appeal was satisfied that there was sufficient evidence.

⁶¹ [1966] IR 69.

⁶² [1966] IR 69 at 73. Cited with approval by the Court of Criminal Appeal in *People (DPP) v Foley* [1995] 1 IR 267 at 286.

⁶³ [2006] IECCA 110.

⁶⁴ [2010] IECCA 85.

(II) *Controlled Drug*

3.27 The term “controlled drug” is defined by section 2(1) of the *Misuse of Drugs Act 1977* as:

“... any substance, product or preparation (other than a substance, product or preparation specified in an order under subsection (3) of this section which is for the time being in force) which is either specified in the Schedule to this Act or is for the time being declared pursuant to subsection (2) of this section to be a controlled drug for the purposes of the Act.”

There is thus no distinction between soft and hard drugs.

(ii) *Intent to Sell or Supply*

3.28 The second element of the offence under section 15A is intention to sell or supply. It is rarely, if ever, necessary for the prosecution to prove intention as section 15A(2) contains a reverse onus provision. This permits the court to presume, until it is satisfied to the contrary,⁶⁵ that there was intention to sell or supply where, having regard to the quantity of the controlled drug which the person possessed or to such other matters as it considers relevant, it is satisfied that the controlled drug was not intended for immediate personal use. Thus, while the accused is entitled to rebut the presumption, the weight of the law is stacked against him or her.

(iii) *Market Value of €13,000*

3.29 The third element of the offence under section 15A is that the controlled drug should have a market value of €13,000 or more. The term “market value” is defined as the price that the drug could be expected to fetch on the market for the unlawful sale or supply of controlled drugs.⁶⁶

3.30 Evidence regarding the market value of the drug may be given by a member of the Garda Síochána or an officer of customs and excise who has knowledge of the unlawful sale or supply of controlled drugs.⁶⁷ In *People (DPP) v Hanley*⁶⁸ the applicant had sought leave to appeal his conviction on the ground that the trial judge had erred in admitting evidence from a retired Garda regarding the value of the drugs in question. It was submitted that the effect of section 15A(3) was to prescribe the manner in which the value of the controlled drug had to be proved and that was by means of a Garda witness giving evidence in accordance with the section. The court rejected this argument and held that section 15A(3) was an “enabling provision”:

“It enables the value of the drugs to be proved by a member of the Garda Síochána or an officer of the Customs and Excise who has knowledge of the unlawful sale or supply of controlled drugs. But what the subsection does not do is say that such evidence may not be adduced in some other manner. It could be adduced by an admission. It could be adduced by some other expert. Certainly any person who would have knowledge of the illegal drug industry may be in a position to satisfy the trial judge that he has the status of an expert and so place himself in a position to give evidence.”

The court found that while the retired Garda witness did not come within section 15A(3), he had proved himself an expert by providing evidence regarding his knowledge and experience of the sale and supply of controlled drugs. Thus he had been competent to give evidence.

3.31 The use of “market value” as the standard for determining whether an offence is an offence under section 15A and thus attracts the statutory minimum sentence is problematic in a number of respects. By and large, these problems stem from the fact that the market value of any commodity may fluctuate to a significant degree depending on when and where that commodity is sold and how much of

⁶⁵ Costello queries whether the term “satisfied to the contrary” requires the accused to establish his or her innocence as a possibility or on the balance of probabilities. See *Irish Current Law Statutes Annotated 1999* at 10-05.

⁶⁶ Section 15A(5) of the *Misuse of Drugs Act 1977*, as amended. See also *Dáil Debates*, Vol 492, Col 536-637, 11 June 1998.

⁶⁷ Section 15A(3) of the *Misuse of Drugs Act 1977*, as amended.

⁶⁸ Court of Criminal Appeal 15 October 2010.

that commodity is already on the market. As a result, evidence regarding the market value of drugs is, at best, an estimate.

3.32 Thus it may be argued that “market value” is not capable of proof beyond a reasonable doubt. That section 15A obliges the prosecution to establish the market value of the drugs concerned beyond a reasonable doubt was recently emphasised by the Supreme Court in *People (DPP) v Connolly*⁶⁹:

“... [P]roof of value is an essential ingredient of the offence under section 15A. It is what distinguishes it from the offence of possession for sale or supply of an unquantified and unvalued amount of drugs. Most importantly, it is what has caused the Oireachtas, subject to exceptional mitigating circumstances, to mark the offence as one of extreme seriousness such as to require the court, in sentencing a convicted person, to impose a penalty of a minimum of ten years’ imprisonment. This is, of course, subject to the exceptions mentioned in the section. The ingredient of value must be proved to the satisfaction of the jury *beyond reasonable doubt*.”⁷⁰
[Emphasis added]

Given that the market value is not static it is, at least, arguable that in most, if not all, cases there will be a reasonable doubt as to the accuracy of the market value being asserted.⁷¹

3.33 The fact that the market value may fluctuate to a significant degree gives rise to a second problem: the risk of arbitrariness. It is not difficult to imagine a situation in which two similarly placed people, convicted of identical offences under section 15A, are sentenced to different terms of imprisonment because the market value in the locality of the first offence is different to the market value in the locality of the second.

3.34 For similar reasons, O’Malley asserts that “market value” is an inappropriate triggering factor.⁷² In this regard he observes that minimum sentences are generally triggered by a factor which is additional to or aggravates the basic offence. He asserts that these triggering factors should be clearly defined and capable of unequivocal identification. As market value depends on the estimated street value of the drugs it cannot be clearly defined or capable of unequivocal definition.⁷³

3.35 Finally, it has been noted that the threshold of €13,000 has not been adjusted since its introduction, with the exception of a slight increase when the Euro was introduced.⁷⁴ This, it is argued, creates the risk of arbitrary and unjust consequences which is mitigated only by the exercise of the limited judicial discretion accorded by section 27.

(I) *People (DPP) v Connolly*

3.36 The process by which market value is determined was considered by the Supreme Court in the recent case of *People (DPP) v Connolly*.⁷⁵ The appellant had been charged with an offence under section 15A when 10 packs, containing 10 kilograms of drugs, were found in his car. Five of the 10 packs were analysed and found to contain amphetamine. While the purity of the amphetamine was not tested, the forensic evidence was that “in general” purities fell between 10% and 40%. On cross-examination it was conceded that the presence of as little as 1% of amphetamine could trigger the results which had been achieved. The crucial issue was whether the threshold market value of €13,000 had been established. If there had been 10% of amphetamine in five of the packs the value of the drugs would

⁶⁹ [2011] IESC 6.

⁷⁰ *People (DPP) v Connolly* [2011] IESC 6.

⁷¹ The process by which market value is determined was considered by the Supreme Court in *People (DPP) v Connolly* [2011] IESC 6 and the Court of Criminal Appeal in *People (DPP) v Finnermore* [2008] IECCA 99.

⁷² O’Malley “Further Observations on DPP v Connolly (Part 1 of 3)” 22 February 2011 Ex Tempore blog: www.extempore.ie.

⁷³ O’Malley “Further Observations on DPP v Connolly (Part 1 of 3)” 22 February 2011 Ex Tempore blog: www.extempore.ie.

⁷⁴ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 341.

⁷⁵ [2011] IESC 6.

have been approximately €72,877.50 while if there had only been 1% the value would have been €7,287.75 which would not have triggered the statutory minimum sentence.

3.37 In the Circuit Criminal Court, the appellant sought a direction that there was no case to answer on the ground that there was insufficient proof that the drugs were worth €13,000 or more. The trial judge refused the application and sentenced the appellant to 10 years' imprisonment.

3.38 The appellant appealed to the Court of Criminal Appeal on the ground that the trial judge had erred in not withdrawing the case from the jury. The Court of Criminal Appeal dismissed the appeal but, pursuant to section 29 of the *Courts of Justice Act 1929*, certified the following question as a question of law of exceptional importance:

"In a prosecution pursuant to section 15A of the Misuse of Drugs Act 1977, for the purpose of ascertaining the amount of a controlled substance present in a powder in a sealed container or in a number of such containers proven by expert evidence to contain that particular controlled substance, may the amount of that controlled substance present in the powder be established by the oral evidence of an expert as to the range within which amounts of that controlled substance in other powders *generally* fell and, if the answer is in the affirmative, must the prosecution disclose to the defence a statement for a report by that expert setting out the facts upon which her or his opinion as to that range is based?" [Emphasis added]

3.39 The Supreme Court considered the limited extent to which the samples had been analysed in so far as the purity of the amphetamine had not been tested. It examined the use of the term "generally" to describe the rate at which purity levels fell between 10% and 40%. In the absence of any clarification as to what "generally" meant, the Supreme Court concluded that "generally" meant "probably" and that probability was not enough to exclude the possibility that the percentage of amphetamine present could have been as low as 1%. The Supreme Court thus set aside the conviction.

3.40 O'Malley commends the Supreme Court for having "reached the right decision ... for the right reason".⁷⁶ He notes, however, that:

"It is rather frightening in retrospect to realise that a conviction for a s.15A offence could be based on the probability as opposed to the actuality of drug purity levels. It is all the more worrying in circumstances where conviction carries either a presumptive or mandatory minimum sentence of 10 years' imprisonment, a matter to which the Supreme Court rightly drew attention. The quashing of the appellant's conviction should be a wake-up call to those charged with furnishing the necessary proofs in trials for s.15A and s.15B offences."⁷⁷

(II) *People (DPP) v Finnermore*

3.41 The process by which market value is determined was considered by the Court of Criminal Appeal in the earlier case of *People (DPP) v Finnermore*.⁷⁸ The applicant had been charged with an offence under section 15A when he was found in possession of a number of bags in which amphetamine was detected. The forensic evidence was that tests had been carried out on one of 48 tape-bound plastic packs and a sample of loose white powder found in another bag. The evidence was that amphetamine was the "main component" in the plastic pack and a "major component" of the loose white powder. Further tests were carried out on 16 of the 48 packs and a sample of the loose white powder. The evidence was that there was a "presence of amphetamine". At no point was the purity of the amphetamine analysed.

3.42 The applicant argued that that it was not reasonable to ask the jury to accept that, on the basis of an analysis of a small portion of the drugs found, all the drugs were, beyond a reasonable doubt, the same. The Court of Criminal Appeal held:

⁷⁶ O'Malley "Further Observations on DPP v Connolly (Part 1 of 3)" 22 February 2011 Ex Tempore blog: www.extempore.ie.

⁷⁷ O'Malley "Further Observations on DPP v Connolly (Part 1 of 3)" 22 February 2011 Ex Tempore blog www.extempore.ie.

⁷⁸ [2008] IECCA 99.

“The question as to what is or is not sufficient analysis, in terms of amount, or the purity of the drugs, must depend on the circumstances of each case. There is no principle or rule of law known to this court which requires that in each and every case, every package found must inevitably be individually analysed before a conviction can be considered safe.”⁷⁹

Thus it would appear that an analysis need not be carried out on every pack found in every case. This will, however, depend very much on the circumstances of the particular case. In *Finnamore*, for instance, the Court appeared to attach weight to the fact that the 48 packs had been “wrapped in a substantially identical manner” and placed together while the loose powder was found, “without any apparent division or distinction between what was taken for analysis and the remainder of the bulk”. The Court noted, however, that in a different case a more extensive analysis might be required.

3.43 In *People (DPP) v Connolly*⁸⁰ the Supreme Court distinguished *Finnamore* on the ground that the forensic evidence in *Finnamore* was that amphetamine was the “main” or “major” component in the samples taken.

(III) *Mens Rea*

3.44 As noted in paragraph 3.15, section 15A(3A) of the *Misuse of Drugs Act 1977*, as amended, provides that mens rea regarding the value of the drugs involved is not necessary. This ensures that both the so-called drug barons, who undoubtedly know the approximate value of the drugs, and the drug couriers, who are less likely to know the value of the drugs, may be found guilty of an offence under section 15A. However, as noted in paragraph 3.24, it is more likely that drug couriers rather than drug barons will be caught for offences under section 15A.

(b) Section 15B: Elements of the Offence

3.45 As discussed in paragraph 3.16, section 15B of the *Misuse of Drugs Act 1977* creates the offence of importing controlled drugs, having a value of €13,000 or more.⁸¹ In this section the elements of an offence under section 15B will be considered.⁸² This is made difficult by the fact that most offenders are charged with offences under section 15A alone even where the facts of the case appear to support a charge under section 15B.⁸³ The only case in which the Court of Criminal Appeal has dealt with an offence under section 15B is *People (DPP) v Ulrich*.⁸⁴ However, as the case is primarily concerned with the factors which may aggravate a sentence the judgment sheds little light on the elements of an offence under section 15B.

(i) Importation of a Controlled Drug

(I) *Importation*

3.46 The first element of the offence under section 15B is *importation* of a controlled drug. The term “import” is not defined by the *Misuse of Drugs Act 1977*, the *Criminal Justice Acts 1999-2007* or the *Misuse of Drugs Regulations 1988-2010*. The ordinary meaning of the term is to bring goods or services into the country for sale.⁸⁵

⁷⁹ [2008] IECCA 99.

⁸⁰ [2011] IESC 6.

⁸¹ Section 1 of the *Euro Changeover (Amounts) Act 2001*.

⁸² The elements which offences under section 15B have in common with offences under section 15A have already been examined at paragraphs 3.22-3.44 so will not be re-examined in this section.

⁸³ In *People (DPP) v Smyth* Court of Criminal Appeal 18 May 2010 a consignment of drugs was found in the DHL compound at Dublin Airport. In *People (DPP) v Shekale* Court of Criminal Appeal 25 February 2008 drugs were found in the suitcase of the applicant, who had been stopped at Dublin Airport having come off a flight from Amsterdam. In *People (DPP) v Farrell* [2010] IECCA 116 a consignment of drugs was found by customs officers at Rosslare Ferry-Port, in a van being driven by the respondent.

⁸⁴ Court of Criminal Appeal 18 February 2010.

⁸⁵ The New Oxford Dictionary of English (Oxford University Press, 2001) at 918.

3.47 It may be noted that although it is an offence under section 15B to *import* controlled drugs it is not an offence under section 15B to *export* controlled drugs. This gives rise to another “illogical conclusion” that a person found importing controlled drugs with a value of €13,000 or more may face a presumptive minimum sentence of 10 years whereas a person found exporting controlled drugs with a value of €13,000 or more may not.

(II) *Controlled Drug*

3.48 As noted in paragraph 3.27, the term “controlled drug” is defined by section 2(1) of the *Misuse of Drugs Act 1977*, as amended. No distinction is made between soft and hard drugs.

(ii) *Market Value*

3.49 The third element of the offence under section 15B is that the controlled drug should have a market value of €13,000 or more. Section 15B(5) provides that the term “market value” is to have the meaning attributed to it by section 15A(5) of the *Misuse of Drugs Act 1977*, as amended. Thus the observations contained in paragraphs 3.29 to 3.44, regarding market value in the context of offences under section 15A, are equally applicable to market value in the context of offences under section 15B.

(c) *Section 27: Penalty for Offences under Section 15A and Section 15B*

(i) *Presumptive Minimum Sentence of 10 Years’ Imprisonment*

3.50 Section 27(3C) of the *Misuse of Drugs Act 1977*, as amended,⁸⁶ provides that where a person is convicted of an offence under section 15A or section 15B the court must impose a minimum sentence of not less than 10 years.⁸⁷ Section 27(3C) must, however, be read in conjunction with section 27(3A), which provides that the maximum sentence for an offence under section 15A is life imprisonment, and section 27(3D), which provides that a period shorter than 10 years may be imposed where there are “exceptional and specific circumstances” relating to the offence or the offender.

3.51 The 10-year minimum should not be used as a benchmark sentence but may be a useful guide as to the gravity of offences under section 15A.⁸⁸ In *People (DPP) v Renald*⁸⁹ the applicant sought leave to appeal against a sentence of five years and argued that once exceptional and specific circumstances were found to exist the 10-year minimum became irrelevant. The Court of Criminal Appeal, *per* Murphy J, rejected this argument:

“Even where exceptional circumstances exist which would render the statutory minimum term of imprisonment unjust, there is no question of the minimum sentence being ignored... even though that sentence may not be applicable in a particular case, the very existence of a lengthy mandatory minimum sentence is an important guide to the Courts in determining the gravity of the offence and the appropriate sentence to impose for its commission. That is not to say that the minimum sentence is necessarily the starting point for determining the appropriate sentence. To do so would be to ignore the other material provisions, that is to say the maximum sentence.”⁹⁰

This passage has been endorsed by the courts on a number of occasions.⁹¹

⁸⁶ Section 33 of the *Criminal Justice Act 2007*; section 84 of the *Criminal Justice Act 2006*; and section 5 of the *Criminal Justice Act 1999*.

⁸⁷ That the court may impose a sentence greater than 10 years has been confirmed by the Court of Criminal Appeal. See, for example, *People (DPP) v Hogarty* Court of Criminal Appeal 21 December 2001 and *People (DPP) v Gilloughly* Court of Criminal Appeal 7 March 2005.

⁸⁸ It is to be expected that the Court of Criminal Appeal would reach a similar finding regarding the 10-year minimum in the context of offences under section 15B.

⁸⁹ Court of Criminal Appeal 23 November 2001.

⁹⁰ Court of Criminal Appeal 23 November 2001.

⁹¹ See *People (DPP) v Botha* [2004] 2 IR 375, 383; and *People (DPP) v Ducque* [2005] IECCA 92.

3.52 The Court of Criminal Appeal has also considered the method by which courts determine the sentence to be imposed in individual cases. In *People (DPP) v Duffy*⁹² the applicant sought leave to appeal against a sentence of 6 years. In the Circuit Court the judge had outlined the method by which he would determine the length of the sentence to be imposed. He indicated that he would first assess the length of the sentence on the assumption that there were no mitigating factors. He would then consider the various mitigating factors and reduce the sentence accordingly. If the result was a sentence which was greater than the statutory minimum, that would be the sentence he would impose. If, on the other hand, the result was a sentence which was less than the statutory minimum, he would consider whether he should increase the sentence to the statutory minimum. The Court of Criminal Appeal upheld this approach and found that it was “essentially in harmony” with the law as explained by Murphy J in *Renald*. It noted that other methods might be equally satisfactory provided that the sentencing judge had taken account of the statutory minimum as he or she was obliged to do.⁹³

3.53 In terms of best practice, it would appear that the sentencing judge should set out clearly the method by which he or she has determined the appropriate sentence to be imposed. In *People (DPP) v Nelson*⁹⁴ the Court of Criminal Appeal observed:

“[I]t is not possible to divine from the judgment with certainty how the learned trial judge arrived at the sentence and in particular how she dealt with the provisions of section 15A of the Misuse of Drugs Act 1977... It is in itself an error in principle when this court is not in a position to evaluate the thought processes which result in the particular sentence...”⁹⁵

3.54 As noted in Chapter 1, the sentencing judge should always have regard to the principles and purposes of sentencing. In *People (DPP) v Murphy*⁹⁶ Finnegan J observed that sentencing frequently involved the elements of punishment, deterrence and rehabilitation. As the applicant had rehabilitated himself and was unlikely to reoffend, however, Finnegan J concluded that the Court of Criminal Appeal could confine its consideration to the punishment of the applicant and the deterrence of others.

3.55 O’Malley asserts that there is room for the appeal courts to spell out the factors relevant to determining the objective seriousness of offences under section 15A.⁹⁷ That said, the Court of Criminal Appeal has provided some guidance regarding the factors which may mitigate or aggravate the seriousness of the offence or the severity of the sentence under section 15A.⁹⁸

(ii) Mitigating Factors: Exceptional and Specific Circumstances

3.56 Section 27(3D)⁹⁹ of the *Misuse of Drugs Act 1977*, as amended, provides that section 27(3C)¹⁰⁰ will not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than 10 years’ imprisonment unjust in all the circumstances.

⁹² Court of Criminal Appeal 21 December 2001.

⁹³ In subsequent cases the Court of Criminal Appeal has tended to advocate the approach adopted in *Duffy*. See *People (DPP) v Farrell* [2010] IECCA 116; and *People (DPP) v Costelloe* Court of Criminal Appeal 2 April 2009.

⁹⁴ Court of Criminal Appeal, 31 July 2008.

⁹⁵ The Court of Criminal Appeal reached a similar conclusion in *People (DPP) v McGrane* Court of Criminal Appeal 8 February 2010, when it observed that it would be useful, while not essential in terms of an appropriate sentencing procedure, if the sentencing judge indicated with *some clarity* where on the scale of seriousness the particular offence fell.

⁹⁶ Court of Criminal Appeal 18 May 2010.

⁹⁷ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 341.

⁹⁸ This is, of course, relevant to sentences for offences under section 15B as well.

⁹⁹ Formerly, section 27(3C).

¹⁰⁰ Formerly, section 27(3B).

3.57 In *People (DPP) v Botha*¹⁰¹ Hardiman J noted that section 27(3C) (now section 27(3D)) requires that the circumstances be both exceptional *and* specific. Thus it would seem to follow that the circumstances contemplated by section 27(3D) are distinct from the circumstances which would ordinarily figure in a plea of mitigation.¹⁰² First, the circumstances contemplated by section 27(3D) must satisfy the high threshold of being *exceptional and specific* whereas the circumstances ordinarily pleaded in mitigation need not. Second, only the circumstances contemplated by section 27(3D) may preclude the application of the statutory minimum whereas the circumstances ordinarily pleaded in mitigation may not. It would seem, however, that not all courts distinguish between circumstances which are exceptional and specific and circumstances which are merely mitigating.¹⁰³ In *People (DPP) v Galligan*,¹⁰⁴ however, Fennelly J interpreted section 27(3D) as obliging the judge to identify the exceptional and specific circumstances upon which he or she relies to justify a departure from the statutory minimum.

3.58 The extent to which exceptional and specific circumstances may justify a downward departure from the statutory minimum is not, however, a precise mathematical calculation. In *People (DPP) v Rossi and Hellewell*¹⁰⁵ the applicants sought leave to appeal against a sentence of 6 years. It was asserted that the trial judge had not given adequate weight to the exceptional and specific circumstances which existed in the case and, in particular, that there should have been a three-year discount for an early plea of guilty. The Court of Criminal Appeal, per Fennelly J, rejected this argument:

“Firstly it cannot be assumed that ten years is the appropriate sentence from which any discounts are to be calculated. The maximum period is life imprisonment, not to say that these particular offences would have attracted life imprisonment, but it is not correct necessarily to calculate by deduction from ten years and secondly it is not an exercise in a *mathematical process* where you take three years for one element and then look for a further calculated discount under the other headings...” [Emphasis added]

3.59 Even where there are exceptional and specific circumstances which justify a downward departure from the statutory minimum, the sentence imposed should reflect the gravity of the offence. In *People (DPP) v Henry*¹⁰⁶ the DPP sought leave to appeal against a sentence of four years on the ground that it was unduly lenient. In this regard, the Court of Criminal Appeal ruled that:

“It remains the case that even if a court properly decides that it would be unjust to impose the mandatory minimum sentence, the sentence it imposes *must nonetheless reflect the gravity of the offence* committed by the respondent having regard to the very draconian penalties which the Oireachtas has seen fit to impose reflecting its view of the seriousness of the offence.” [Emphasis added]

3.60 Section 27(3D) indicates that exceptional and specific circumstances may include “any matters [the court] considers appropriate” including whether the person has pleaded guilty to the offence and whether the person has materially assisted in the investigation of the offence.¹⁰⁷ As noted in Chapter 1, a guilty plea and material assistance are, in general, considered to be factors which mitigate the severity of sentence rather than the seriousness of an offence.

¹⁰¹ [2004] 2 IR 375 at 384.

¹⁰² *People (DPP) v Ducque* [2005] IECCA 92.

¹⁰³ *People (DPP) v Renald* Court of Criminal Appeal 23 November 2001.

¹⁰⁴ Court of Criminal Appeal 23 July 2003.

¹⁰⁵ Court of Criminal Appeal 18 November 2002.

¹⁰⁶ Court of Criminal Appeal 15 May 2002.

¹⁰⁷ Section 27(3C)(b)/27(3D)(b)(ii) of the *Misuse of Drugs Act 1977*, as amended.

(I) *Guilty Plea*

3.61 Section 27(3D)(b)(i)¹⁰⁸ of the *Misuse of Drugs Act 1977*, as amended, provides that a guilty plea may be considered an exceptional and specific circumstance for the purpose of considering whether the statutory minimum sentence of 10 years should apply.

3.62 The provision recognises, however, that the stage at which the accused indicates his or her intention to plead guilty and the circumstances surrounding that plea may be relevant to the determination of whether or not the statutory minimum should apply. Thus, in *People (DPP) v Anderson*¹⁰⁹ Finnegan J noted:

“An early plea of guilty is of value in every case but the extent to which it is of value will depend on the circumstances of the case and very often will depend on the nature of the evidence available against an accused person. If he is caught red-handed such a plea is of less value than it might be in other cases. There are also particular cases, such as sexual assault, rape and so forth, where a plea spares the victim the ordeal of giving evidence and appearing in court, where a plea is almost always of value.”

3.63 Specifically, section 27(3D)(b)(i)(I)¹¹⁰ refers to the stage at which the accused indicates his or her intention to plead guilty. An early guilty plea merits more credit than a late guilty plea. Thus in *People (DPP) v. Godspeed*¹¹¹ the Court of Criminal Appeal ruled that the statutory minimum should not apply where there had been an early guilty plea and the applicant had cooperated with the gardaí.¹¹² By contrast, in *People (DPP) v Coles*¹¹³ the Court of Criminal Appeal noted that a guilty plea entered on the date of trial merited less credit than an early plea.¹¹⁴

3.64 Section 27(3D)(b)(i)(II)¹¹⁵ refers to the circumstances surrounding the guilty plea. An accused who voluntarily pleads guilty will be given more credit than an accused who pleads guilty having been caught red-handed. Thus in *People (DPP) v Nelson*¹¹⁶ the Court of Criminal Appeal noted that it was well established that where someone is caught red-handed, there is little by way of defence and thus a guilty plea merits considerably less than might otherwise be the case.¹¹⁷

3.65 The Court of Criminal Appeal has, however, cautioned against treating a guilty plea, in and of itself, as an exceptional and specific circumstance. In *People (DPP) v Ducque*¹¹⁸ the court was of the view that a guilty plea could be taken into account when considering whether to mitigate a sentence and not, without more, to prevent the application of the statutory minimum. Geoghegan J observed:

¹⁰⁸ Formerly, section 27(3C)(a).

¹⁰⁹ Court of Criminal Appeal, 18 May 2010.

¹¹⁰ Formerly, section 27(3C)(a)(i).

¹¹¹ Court of Criminal Appeal 13 July 2009.

¹¹² Other examples include *People (DPP) v Brodigan* Court of Criminal Appeal 13 October 2008; and *People (DPP) v Benjamin* Court of Criminal Appeal 14 January 2002.

¹¹³ Court of Criminal Appeal 7 December 2009.

¹¹⁴ See *People (DPP) v Costelloe* Court of Criminal Appeal 2 April 2009; and *People (DPP) v Henry* Court of Criminal Appeal 15 May 2002.

¹¹⁵ Formerly, section 27(3C)(a)(ii).

¹¹⁶ Court of Criminal Appeal, 31 July 2008.

¹¹⁷ Other examples include *People (DPP) v Delaney* Court of Criminal Appeal 21 June 2010; *People (DPP) v Keogh* Court of Criminal Appeal, 23 November 2009; *People (DPP) v Kinahan* Court of Criminal Appeal 14 January 2008; *People (DPP) v Lernihan* Court of Criminal Appeal 18 April 2007; *People (DPP) v Ducque* [2005] IECCA 92; *People (DPP) v Galligan* Court of Criminal Appeal 23 July 2003; and *People (DPP) v Henry* Court of Criminal Appeal 15 May 2002.

¹¹⁸ [2005] IECCA 92.

“First of all there is nothing exceptional about a plea of guilty, it is one of the commonest occurrences in any criminal trial. Secondly, it seems to be at least implied in the judgment of this court delivered by Hardiman J in *Botha* ... that importance must be attached to the conjunctive ‘and, if so’ in the statutory provision so that a plea of guilty can only be relevant to an escape from the mandatory minimum sentence if there are other circumstances which effectively can render the combination of the plea of guilty and those circumstances to be exceptional circumstances. These can include the stage at which the accused indicated the intention to plead guilty, the circumstances in which the indication was given and whether that person materially assisted in the investigation of the offence.”

3.66 Thus the courts will generally consider whether there is some additional factor which endows the guilty plea with exceptionality. Thus in *People (DPP) v Farrell*¹¹⁹ the Court of Criminal Appeal observed that the early plea was a “welcome relief to an already overcrowded list” and had assisted the prosecution case, which might have been difficult as there was evidence that the respondent and his family had been threatened. Similarly, in *People (DPP) v Dermody*¹²⁰ the Court of Criminal Appeal appeared to accept the argument that exceptionality arose out of the fact that the plea had been particularly early.

3.67 More often than not the courts will consider a guilty plea in addition to other factors. Thus in *People (DPP) v Renald*,¹²¹ for instance, the court was asked to consider not only the fact that the defendant had made a full admission regarding the offence but also the fact that he had no previous convictions; had materially assisted the Gardaí in their investigation; had a low level of involvement in the offence; was unlikely to re-offend; was diligent and hard-working; had difficult personal circumstances; and was a foreign national. The Court of Criminal Appeal observed, however, that while the trial judge was satisfied that there were exceptional and specific circumstances “she was not concerned to identify which of the factors so satisfied her”. It is thus unclear which of these factors would be exceptional and specific in their own right.¹²²

3.68 There may be an overlap between a guilty plea and the provision of material assistance. Where there is an overlap this should not necessarily result in separate reductions of the sentence. In *People (DPP) v Galligan*¹²³ the Court of Criminal Appeal observed that the trial judge had considered the plea of guilty and material assistance together. In this regard, Fennelly J observed:

“In some cases, sentencing judges attribute separate values to individual mitigating factors. That may, on occasion be justified to the extent that they can be clearly segregated. It is to be noted that the ‘*exceptional and specific circumstances*’ may relate either ‘to the offence, or the person convicted of the offence.’ The judge should, however, bear in mind that there may be an element of overlap between the specified circumstances.”

The court concluded that *Galligan* was such a case and that the trial judge had been “correct to assess the extent of any mitigation in one reduction, without differentiation”. In the circumstances of the case, the guilty plea and the assistance provided to the Gardaí were “closely causally linked” and both related to the offence rather than the offender.¹²⁴

¹¹⁹ [2010] IECCA 116.

¹²⁰ [2007] 2 IR 622.

¹²¹ Court of Criminal Appeal 23 November 2001.

¹²² Other examples include *People (DPP) v Howard and McGrath* Court of Criminal Appeal 29 July 2005; *People (DPP) v Botha* Court of Criminal Appeal 19 January 2004; *People (DPP) v Alexiou* [2003] 3 IR 513; *People (DPP) v Benjamin* Court of Criminal Appeal 14 January 2002; *People (DPP) v Hogarty* Court of Criminal Appeal 21 December 2001.

¹²³ Court of Criminal Appeal 23 July 2003.

¹²⁴ A similar approach is evident in *People (DPP) v Kinahan* Court of Criminal Appeal 14 January 2008.

3.69 Similarly, in *People (DPP) v McGrane*¹²⁵ the Court of Criminal Appeal observed that a guilty plea normally coincides with co-operation with the Gardaí. It emphasised, however, that co-operation would not necessarily result in a separate discount unless, for example, it entails the disclosure of information in relation to others involved in the offence.

3.70 While a guilty plea may result in the statutory minimum not being imposed, it is not the case that an accused who does not plead guilty or co-operate will automatically receive a 10-year sentence.¹²⁶ In the same vein, an accused who decides to fight his or her case should not be penalised. In *People (DPP) v Shekale*¹²⁷ the Court of Criminal Appeal found that the trial judge had, in effect, penalised the applicant for having fought his case “tooth and nail”. The court thus reduced a sentence of 13 years with two years suspended to 10 years with two years suspended.

3.71 In a 2001 Department of Justice report,¹²⁸ McEvoy concluded that section 27 had been reasonably successful in its operation in so far as it had encouraged a very high rate of guilty pleas. During the period of November 1999 to May 2001, in all but one of 55 cases the accused had pleaded guilty. This he attributed to the fact that a conviction following a “not guilty” plea would probably have resulted in the imposition of a 10-year sentence. Section 27 had thus saved court time and public funds, freed up Gardaí and resulted in a higher rate of conviction. He noted, however, that there was now a “positive disincentive” to test the prosecution case:

“In a criminal trial anything can go wrong; difficulties can arise with warrants, witnesses may be unavailable for a variety of reasons, there can be a flaw in the chain of evidence, technical errors may be made and so forth. However the consequences of unsuccessfully testing the prosecution case in a s.15A charge are so severe, it would seem that one of the practical effects of the section has been to discourage the vast majority of accused persons from proceeding to trial unless the case against them appears to be obviously flawed.”

While there is no research to prove that this is still the case, anecdotal evidence strongly suggests that it is.

(II) *Material Assistance*

3.72 Section 27(3D)(b)(ii)¹²⁹ of the *Misuse of Drugs Act 1977*, as amended, provides that material assistance may also be considered an exceptional and specific circumstance for the purpose of determining whether the statutory minimum sentence should apply.

3.73 Material assistance may take many forms. In *People (DPP) v Davis*¹³⁰ Denham J observed that:

“The most basic [form of material assistance] is to admit the offence. Secondly, an admission may be made together with showing the Gardaí drugs, etc, relating to the specific offence in issue. Thirdly, there is a much more significant material assistance where an accused assists the Gardaí in relation to other offences and criminality. This latter is a matter of great public interest, and has been given significant weight in other cases.”

Broadly speaking, therefore, an admission or the provision of information, regarding the particular offence or other offences, may be considered material assistance.

¹²⁵ Court of Criminal Appeal 8 February 2010.

¹²⁶ Smith “Sentencing Section 15A Offences” (2010) 20(1) ICLJ 8; *People (DPP) v Duffy* Court of Criminal Appeal 21 December 2001.

¹²⁷ Court of Criminal Appeal 25 February 2008.

¹²⁸ McEvoy *Research for the Department of Justice on the Criteria applied by the Courts in sentencing under s.15A of the Misuse of Drugs Act 1977 (as amended)* (Department of Justice, 2001).

¹²⁹ Formerly, section 27(3C)(b).

¹³⁰ Court of Criminal Appeal 19 February 2008.

(aa) Admission

3.74 The Court of Criminal Appeal has cautioned against treating an admission, without more, as an exceptional and specific circumstance. In *People (DPP) v Coles*¹³¹ Finnegan J emphasised that:

“[A]dmissions are not necessarily matters to which regard can be had for the purposes of section 15A and in particular where a sentence less than the presumptive statutory minimum is being considered. What the court is concerned with is material assistance. There are a number of cases where significant material assistance was given and comparatively modest sentences then attached to the offender. In particular assistance above and beyond one’s own involvement will be relevant and where someone at risk of life or at risk of serious injury or exposing themselves to danger co-operates and assists the Gardaí, clearly they should get every consideration when it comes to sentence. But merely to admit one’s own part may not merit a great deal of consideration in terms of sentence and particularly as here, where the applicant is caught red-handed.”

Thus the crucial issue is whether or not the admission constitutes material assistance. This is more likely to be the case where the accused has inconvenienced himself or herself such as where the admission goes beyond the accused’s own involvement or exposes the accused to a risk of death or injury.

3.75 In general, an admission regarding the accused’s involvement, without more, will not constitute material assistance. Thus in *People (DPP) v Dermody*,¹³² where the applicant admitted to his own role but refused to provide information regarding his suppliers, the Court of Criminal Appeal found that the admissions did not amount to exceptional and specific circumstances. By contrast, in *People (DPP) v Sweeney*¹³³ the Court of Criminal Appeal referred to the fact that the applicant had “immediately and frankly and totally accepted responsibility” in concluding that the admission merited more credit than the sentencing judge had attributed to it.¹³⁴

3.76 An admission which facilitates the investigation or prosecution of the offence is more likely to constitute material assistance. In *People (DPP) v Purcell*,¹³⁵ for instance, the Court of Criminal Appeal noted that the applicant had facilitated the prosecution case by admitting to possession of drugs found on property of which he was not the occupier. Similarly, in *People (DPP) v Brodigan*¹³⁶ the Court of Criminal Appeal observed that the applicant had facilitated the prosecution case by admitting to possession of drugs found in a house in which she and a number of others were residing.¹³⁷ Likewise an admission which assists the investigation or prosecution of another offence may constitute material assistance. Thus in *People (DPP) v Duffy*¹³⁸ the court held that credit should be given to the applicant who had expressed a desire to plead guilty to a charge on which he had yet to be returned.

3.77 A voluntary admission merits more credit than an admission where the accused had been caught red-handed. In *People (DPP) v McGrane*¹³⁹ the Court of Criminal Appeal appeared to accept that

¹³¹ Court of Criminal Appeal 7 December 2009.

¹³² [2007] 2 IR 622.

¹³³ Court of Criminal Appeal 12 March 2009.

¹³⁴ The court appeared to be influenced by the fact that the applicant suffered from ADHD and Asperger Syndrome.

¹³⁵ Court of Criminal Appeal 21 June 2010.

¹³⁶ Court of Criminal Appeal 13 October 2008.

¹³⁷ Similar information was provided by the applicants in *People (DPP) v Botha* [2004] 2 IR 375 and *People (DPP) v Rossi and Hellewell* Court of Criminal Appeal 18 November 2002.

¹³⁸ Court of Criminal Appeal 21 December 2001.

¹³⁹ Court of Criminal Appeal 8 February 2010.

the applicant's full and frank admissions constituted exceptional and specific circumstances but noted that they merited less credit as the applicant had been under surveillance and caught red-handed.¹⁴⁰

(bb) *Information*

3.78 Information which assists the investigation or prosecution of an offence may constitute material assistance. Thus in *People (DPP) v Delaney*¹⁴¹ the Court of Criminal Appeal found that the respondent had materially assisted the investigation when he furnished a tick list of his customers and explained a number of text messages on his mobile phone. By contrast, in *People (DPP) v Galligan*¹⁴² the Court of Criminal Appeal found that the applicant had provided minimal assistance when he disclosed the hiding place of a cache of drugs, the bulk of which had already been found by the Garda Síochána.

3.79 Information regarding those in charge of the operation is particularly sought after. Thus in *People (DPP) v Renald*¹⁴³ and *People (DPP) v Rossi and Hellewell*,¹⁴⁴ for instance, the applicants were given credit for information regarding the individuals who had been running the operation. Conversely, in *People (DPP) v Henry*¹⁴⁵ the Court of Criminal Appeal increased a sentence from four years to 6 years because, although the respondent had materially assisted, he had been given too much credit by the sentencing judge in circumstances where he had refused to indicate the other persons involved.¹⁴⁶ The courts appear to have grown more sympathetic towards those who feel that they cannot provide information for fear of retribution. In *People (DPP) v Anderson*,¹⁴⁷ for instance, the Court of Criminal Appeal observed that in cases of this type it is often difficult for the accused to give full information to the Gardaí because of the air of threat or fear which surrounds the drug industry.¹⁴⁸

3.80 The fact that the provision of material assistance may warrant greater leniency in sentencing gives rise to a number of problems. Aside from the fact that an accused might be inclined to point the finger at someone in order to benefit from a reduced sentence, the provision of material assistance appears to be a mitigating factor of which low-level offenders, such as couriers, are less likely to benefit. On the one hand, couriers are less likely to have access to material information regarding the ringleaders of the operation. On the other, couriers might prefer to risk a severe sentence where the alternative is retribution by a criminal gang.¹⁴⁹ Similarly, Smith has remarked on the failure of the legislation to provide for a mechanism by which an accused might provide such information in camera.¹⁵⁰

(III) *Any Matters the Court considers Appropriate*

3.81 Section 27(3D)(b)¹⁵¹ also provides that the court may have regard to "any matters it considers appropriate". In *People (DPP) v Renald*¹⁵² the Court of Criminal Appeal observed:

¹⁴⁰ Other examples include *People (DPP) v Kinahan* Court of Criminal Appeal 14 January 2008; *People (DPP) v Lernihán* Court of Criminal Appeal 18 April 2007; *People (DPP) v Ducque* [2005] IECCA 92; *People (DPP) v Galligan* Court of Criminal Appeal 23 July 2003; and *People (DPP) v Henry* Court of Criminal Appeal 15 May 2002.

¹⁴¹ Court of Criminal Appeal 21 July 2010.

¹⁴² Court of Criminal Appeal 23 July 2003.

¹⁴³ Court of Criminal Appeal 23 November 2001.

¹⁴⁴ Court of Criminal Appeal 18 November 2002.

¹⁴⁵ Court of Criminal Appeal 15 May 2002.

¹⁴⁶ Smith "Sentencing Section 15A Offences" (2010) 20(1) ICLJ 8 ff.

¹⁴⁷ Court of Criminal Appeal 18 May 2010.

¹⁴⁸ Similar observations were made by the Court of Criminal Appeal in *People (DPP) v Nelson* Court of Criminal Appeal 31 July 2008.

¹⁴⁹ *People (DPP) v Kinahan* Court of Criminal Appeal 14 January 2008.

¹⁵⁰ Smith "Sentencing Section 15A Offences" (2010) 20(1) ICLJ 8.

¹⁵¹ Previously, section 27(3C).

“Subsection (3C) specifies certain matters which the Oireachtas recognise may be material in determining whether the imposition of the minimum sentence might be unjust. In addition, however, the Legislature permitted the Court to ‘have regard to any matters it considers appropriate’.”

3.82 The matters to which a court may have regard have not been exhaustively defined. However, there are a number of matters to which the courts’ attention has been drawn on a frequent basis. These include factors which mitigate the seriousness of the offence, in terms of culpability, harm and/or offender behaviour while committing the offence, and factors which mitigate the severity of the sentence.

(aa) *Factors which Mitigate the Seriousness of the Offence*

3.83 Factors which mitigate the seriousness of the offence include duress, intellectual disability, a low level of involvement and the type, nature and quantity of the drugs.

Duress - Culpability

3.84 The fact that an offender was pressurised into carrying or holding drugs may be considered an exceptional and specific circumstance. Thus in *People (DPP) v Kirwan*¹⁵³ the Court of Criminal Appeal found that the sentencing judge had not attached sufficient weight to the element of duress, namely, the fact that the applicant had agreed to mind drugs for another person of whom the applicant had good reason to fear, which was an “exceptional feature” of the case. It thus increased the suspended portion of a 7-year sentence from one to three years. Similarly, in *People (DPP) v Spratt*¹⁵⁴ the Court of Criminal Appeal noted that a drug addict with an expensive drug habit might be more readily “forced or encouraged” to deal in or carry drugs. In *People (DPP) v Farrell*¹⁵⁵ it was submitted that the applicant had had no choice but to act as a courier for drug dealers to whom he was indebted and who had threatened his life. The Court of Criminal Appeal noted the difficulty of ascertaining whether or not such a submission was well-founded when it was based on the accused’s own unverified submission. Similar submissions have been made in a number of cases.¹⁵⁶

Intellectual Disability - Culpability

3.85 The fact that an offender suffers from an intellectual disability, has low intelligence or is, simply, gullible and naive may constitute an exceptional and specific circumstance. Thus in *People (DPP) v Alexiou*¹⁵⁷ the Court of Criminal Appeal had regard to the fact that the respondent was a person of limited intellectual abilities, highly manipulable, suggestible and naïve. Similarly, in *People (DPP) v Sweeney*¹⁵⁸ the court observed that the “truly exceptional and indeed highly unusual element” was the fact that the applicant suffered from ADHD and Aspergers Syndrome.

Type, Quantity and Value of the Controlled Drug - Harm

3.86 Regarding the *type* of drugs, it may be observed that the Oireachtas has tended to distinguish between soft and hard drugs for less serious offences¹⁵⁹ but makes no such distinction for more serious offences.¹⁶⁰ Thus an offence under section 15A or section 15B of the *Misuse of Drugs Act 1977* will attract the presumptive minimum term of 10 years’ imprisonment regardless of whether the drugs

¹⁵² Court of Criminal Appeal 23 November 2001.

¹⁵³ Court of Criminal Appeal 17 May 2010.

¹⁵⁴ Court of Criminal Appeal 10 December 2007.

¹⁵⁵ [2010] IECCA 116.

¹⁵⁶ See *People (DPP) v Anderson* Court of Criminal Appeal 18 May 2010; *People (DPP) v Murphy* Court of Criminal Appeal 18 May 2010; and *People (DPP) v Nelson* Court of Criminal Appeal 31 July 2008.

¹⁵⁷ [2003] 3 IR 513.

¹⁵⁸ Court of Criminal Appeal 12 March 2009.

¹⁵⁹ See section 3 and section 27(1) of the *Misuse of Drugs Act 1977*.

¹⁶⁰ See section 5 and section 27(3) of the *Misuse of Drugs Act 1977*.

involved could be classified as soft or hard drugs. The then Minister for Justice justified the decision not to distinguish between types on the basis that:

“Gangs are not concerned primarily with the *type of drugs* in which they deal. They are interested in profit. In those circumstances the approach taken in the Bill is to link the new drug trafficking offence to monetary amounts.”¹⁶¹ [Emphasis added]

3.87 The Court of Criminal Appeal has ruled, however, that the courts may have *limited* regard to the *type* of controlled drug involved. In *People (DPP) v Renald*¹⁶² the applicant appealed against a five-year sentence on the ground that, having regard to the nature, value and quantity of the drugs involved, the sentence was excessive. In this regard, Murphy J observed:

“In the Misuse of Drugs Act 1977-1984 the Oireachtas has drawn a distinction, for some purposes, between cannabis or cannabis resin on the one hand and other controlled drugs on the other. In a charge in summary proceedings of possession of cannabis it is only on the third or subsequent convictions that the maximum penalty equals that available on a charge on similar procedures for other controlled drugs. To that extent and in that context it may be said that offences relating to cannabis might be treated less severely than those relating to other drugs. It is, however, an argument of very limited value. In cases governed by the value of drugs rather than their nature the distinction is irrelevant. However, it is a factor to which a sentencing judge in his or her discretion might attach some *limited significance*.”¹⁶³ [Emphasis added]

3.88 This view has been endorsed by the Court of Criminal Appeal on a number of occasions.¹⁶⁴ In *People (DPP) v Long*,¹⁶⁵ for instance, Kearns J observed that the extent to which a particular drug might be shown to be actually or potentially more harmful than another was a factor of *some value* to which a sentencing judge might have regard.

3.89 Regarding the *value* of the drugs, it may be noted that section 15A of the *Misuse of Drugs Act 1977*, as amended, refers specifically to *value*. It would thus seem to follow that the courts should be entitled to consider the value and - by necessary implication - the quantity of the drugs involved in order to determine whether the statutory minimum sentence should apply. That the courts were not *entitled* but *obliged* to consider the *value* and *quantity* was confirmed by the Court of Criminal Appeal in *People (DPP) v Long*.¹⁶⁶ In that case, the DPP had appealed against a two-year sentence on the ground that it was unduly lenient. It was asserted that the Circuit Court had failed to take into account the gravity of the offence having regard to the substantial value of the drugs involved, namely cocaine to a value of €111,370. In this regard, Kearns J stated:

“[T]he Court has no hesitation in concluding that the *quantity* and *value* of drugs seized are *critical factors* to be taken into account in evaluating the overall seriousness of the offence. That is implicit from the terms of s.15(A) itself which provides a separate and more draconian regime of sentencing for a person found in possession of controlled drugs which exceed a certain value ... it is true that this Court has not specifically stated until this case that the value of the drugs seized is an important factor in sentencing but that is plainly to be inferred from a number of pronouncements of this Court when dealing with drug cases.”¹⁶⁷ [Emphasis added]

¹⁶¹ Dáil Debates, Vol. 492, Col 884, 1 July 1998.

¹⁶² Court of Criminal Appeal 23 November 2001.

¹⁶³ *People (DPP) v Renald* Court of Criminal Appeal 23 November 2001.

¹⁶⁴ *People (DPP) v Farrell* [2010] IECCA 116; *People (DPP) v Nelson* Court of Criminal Appeal 31 July 2008; *People (DPP) v Long* Court of Criminal Appeal 31 October 2008; *People (DPP) v Long* [2006] IECCA 49; and *People (DPP) v Gilligan (No 2)* [2004] 3 IR 87, 92.

¹⁶⁵ Court of Criminal Appeal 31 October 2008.

¹⁶⁶ Court of Criminal Appeal 31 October 2008.

¹⁶⁷ Court of Criminal Appeal 31 October 2008.

Thus, whereas the type of drug may be considered a matter of *limited* significance, the value and quantity of the drug are matters of *critical* importance.

Offender's Level of Involvement - Offender Behaviour

3.90 A low level of involvement in the commission of an offence may be considered an exceptional and specific circumstance. It is arguable that this approach conflicts with the Oireachtas's stated intention that the courts should focus on the social impact of drug trafficking rather than the circumstances of the offender.¹⁶⁸

3.91 Nevertheless, it has been observed that the courts have shown a marked reluctance to impose the statutory minimum sentence on low-level offenders for fear that it would result in a disproportionate sentence in many cases.¹⁶⁹ In *People (DPP) v Alexiou*¹⁷⁰ Murray J observed that in many cases low-level offenders, such as couriers, are vulnerable people who would not have become involved in the illegal drug trade had they not been exploited by professional drug dealers.¹⁷¹ There has thus been a tendency to treat low-level offenders more leniently than high-level offenders. In *People (DPP) v Botha*,¹⁷² for instance, Hardiman J stated:

"The position of [couriers] must of course be distinguished from those who are more calculatedly involved in the supply of drugs. There is every scope to do this, since the maximum sentence is life imprisonment. But it is clearly the policy of the Oireachtas that severe deterrent sentences be imposed unless it is positively unjust by reason of exceptional and specific circumstances to do so."¹⁷³

3.92 Thus low-level involvement may justify a downward departure from the statutory minimum where there are exceptional and specific circumstances, whereas high-level involvement may justify an upward departure of up to life imprisonment. In *People (DPP) v Whitehead*,¹⁷⁴ for instance, the Court of Criminal Appeal had regard to the fact that the applicant had been used as a courier - in addition to the fact that she was a foreign national with financial troubles and difficult personal circumstances - to reduce her sentence from seven years with one year suspended to three and a half years. By contrast, in *People (DPP) v Long*¹⁷⁵ the Court of Criminal Appeal had regard to the fact that the applicant had been an "important and essential cog" in the drugs venture to uphold a sentence of 14 years. Similarly, in *People (DPP) v Henry*¹⁷⁶ the Court of Criminal Appeal had regard to the fact that the respondent had played a significant role in the offence to increase his sentence from four to 6 years.

3.93 In addition, the Court of Criminal Appeal has distinguished between offenders who are vulnerable and offenders who willingly engage in the drug trade for financial gain. In *People (DPP) v Hogarty*,¹⁷⁷ for instance, Keane CJ observed that couriers who become involved in the drug trade for financial gain could not "expect to receive anything but severe treatment from the courts".¹⁷⁸ The Court of

¹⁶⁸ See Criminal Justice Bill 2004: Committee Stage (Resumed) Select Committee on Justice, Equality, Defence and Women's Rights Debate, Thursday, 11 May 2006.

¹⁶⁹ McEvoy *Research for the Department of Justice on the Criteria applied by the Courts in sentencing under s.15A of the Misuse of Drugs Act 1977 (as amended)* (Department of Justice, 2001).

¹⁷⁰ *People (DPP) v Alexiou* [2003] 3 IR 513, 518-519.

¹⁷¹ *People (DPP) v Alexiou* [2003] 3 IR 513, 518-519.

¹⁷² [2004] 2 IR 375.

¹⁷³ This was cited in *People (DPP) v Ducque* [2005] IECCA 92.

¹⁷⁴ Court of Criminal Appeal 20 October 2008.

¹⁷⁵ [2006] IECCA 49.

¹⁷⁶ Court of Criminal Appeal 15 May 2002.

¹⁷⁷ Court of Criminal Appeal 21 December 2001.

¹⁷⁸ Other examples include *People (DPP) v Keogh* Court of Criminal Appeal 23 November 2009; *People (DPP) v Long* [2006] IECCA 49; and *People (DPP) v Peyton* Court of Criminal Appeal 14 January 2002.

Criminal Appeal has also distinguished between couriers and transporters. In *People (DPP) v Farrell*¹⁷⁹ Finnegan J observed that the respondent could not be classified as a courier, in terms of being a “person carrying controlled drugs in or on his person or in his personal luggage”, but was rather a transporter of a large quantity of drugs with a high market value.¹⁸⁰

3.94 Notwithstanding motive, the courts have recognised the essential role of couriers who shield those higher up in the drug trade from the reaches of the law. In *People (DPP) v Costelloe*,¹⁸¹ for instance, Finnegan J observed:

“[I]t must be borne in mind that a mule plays an important part in the drugs industry and without the mule’s involvement those involved at a more significant level would be less likely to escape detection, prosecution and conviction. The role of the mule is important and significant to those who operate at a higher level.”¹⁸²

(bb) *Factors which Mitigate the Severity of the Sentence*

3.95 Factors which mitigate the severity of the sentence include previous good character, rehabilitation, the particular burden of a custodial sentence and, in one case, humanity.

Previous Good Character

3.96 The fact that an offender was previously of good character may be considered an exceptional and specific circumstance. In *People (DPP) v Galligan*¹⁸³ the Court of Criminal Appeal observed that the fact that an offender was, or given the nature of his or her other convictions should be treated as being, a first offender could be an exceptional and specific circumstance. Thus in *People (DPP) v Duffy*,¹⁸⁴ for instance, the sentencing judge had regard to the absence of previous convictions to reduce a sentence from 15 to 6 years.¹⁸⁵

3.97 Where an offender has minor previous convictions, which are not related to drug trafficking, he or she may be treated as a first offender. Thus in *People (DPP) v Galligan*¹⁸⁶ the Court of Criminal Appeal ruled that previous convictions for road traffic offences could not be considered “previous convictions of a material kind”.¹⁸⁷ Similarly, an offender who has previous convictions which date back some time may have those offences disregarded. Thus in *People (DPP) v Botha*¹⁸⁸ the Court of Criminal Appeal upheld the sentencing judge’s decision to disregard a conviction for fraud in 1985 and a conviction for theft in 1986 on the ground that they were remote in time.¹⁸⁹

3.98 By contrast, an offender who has numerous previous convictions may be treated more severely. Thus in *People (DPP) v Coles*¹⁹⁰ the Court of Criminal Appeal observed that while none of the

¹⁷⁹ [2010] IECCA 116.

¹⁸⁰ The drugs were found in a van being driven by the respondent.

¹⁸¹ Court of Criminal Appeal 2 April 2009.

¹⁸² A similar view was expressed by Finnegan J in *People (DPP) v McGrane* Court of Criminal Appeal 8 February 2010.

¹⁸³ *People (DPP) v Galligan* Court of Criminal Appeal 23 July 2003.

¹⁸⁴ Court of Criminal Appeal 21 December 2001.

¹⁸⁵ Other examples include *People (DPP) v Renald* Court of Criminal Appeal 23 November 2001; and *People (DPP) v Benjamin* Court of Criminal Appeal 14 January 2002.

¹⁸⁶ *People (DPP) v Galligan* Court of Criminal Appeal 23 July 2003.

¹⁸⁷ Other examples include *People (DPP) v McGrane* Court of Criminal Appeal 8 February 2010; and *People (DPP) v Keogh* Court of Criminal Appeal 23 November 2009.

¹⁸⁸ *People (DPP) v Botha* [2004] 2 IR 375.

¹⁸⁹ See *People (DPP) v Purcell* Court of Criminal Appeal 21 June 2010.

¹⁹⁰ Court of Criminal Appeal 7 December 2009.

applicant's 63 previous convictions were serious he could not be described as "young in crime". Similarly, in *People (DPP) v Farrell*¹⁹¹ the Court of Criminal Appeal had regard to the fact that the applicant had a large number of previous convictions, even though only one of those was for an offence under the Misuse of Drugs legislation.

3.99 The existence of previous drug trafficking convictions may justify an upward departure from the statutory minimum. It suffices to note at this juncture that section 27(3B) and section 27(3D)(c)(i) provide that the court may have regard to previous drug trafficking convictions when determining whether the statutory minimum should apply. This will be examined in greater detail in paragraphs 3.110 to 3.115.

Rehabilitation

3.100 The fact that an offender has sought to overcome a drug addiction may be considered an exceptional and specific circumstance. Thus in *People (DPP) v Anderson*¹⁹² the Court of Criminal Appeal observed that the sentence imposed by the trial judge had not reflected the applicant's efforts to rehabilitate himself:

"One matter which concerns the court and that is while there was some consideration given to rehabilitation this court believes that the sentence could have been constructed so as to enhance or reinforce the applicant's efforts in that regard by giving incentive to the applicant to continue to rehabilitate, to clear himself of his drug habit and to stay away from criminal pursuits. The sentence actually imposed is close to the minimum, perhaps even below the minimum, which should have been imposed having regard to the circumstances of the offence itself. However in order to give effect to the objective in sentencing that offenders should be rehabilitated the court is of the view that this objective was not sufficiently considered by the learned trial judge and in that regard there was an error in her approach to sentencing which will enable this court to substitute for that sentence imposed by the learned trial judge its own sentence."

3.101 Similarly in *People (DPP) v Ryan*¹⁹³ the Court of Criminal Appeal referred to the "exceptional circumstance" of the respondent having remained drug-free for almost four years to uphold a five-year suspended sentence. In *People (DPP) v Murphy*¹⁹⁴ the Court of Criminal Appeal remarked on the "extraordinary and exceptional circumstances" regarding the rehabilitation of the applicant. The applicant had, between the time of the offence and the trial, attended Lifeline Recovery, become an outreach coordinator, taken a diploma in addiction studies and become a Sunday school teacher. He was completely clean of drugs at the time of sentencing. The Court of Criminal Appeal increased the suspended portion of the 10-year sentence which had been imposed from three to 6 years. By contrast, in *People (DPP) v Keogh*¹⁹⁵ the Court of Criminal Appeal upheld the sentencing judge's finding that there were no exceptional or specific circumstances despite the fact that the applicant had taken a number of steps towards tackling his alcohol and drug abuse.¹⁹⁶

3.102 On a related note, the fact that an offender is unlikely to re-offend may be considered an exceptional and specific circumstance. Thus in *People (DPP) v Renald*¹⁹⁷ the court had regard to the fact that the applicant was unlikely to re-offend in concluding that the statutory minimum should not apply.

Particular Burden of Custodial Sentence

3.103 A custodial sentence may constitute a particular burden for certain offenders such as those who are foreign nationals or suffer from ill-health.

¹⁹¹ [2010] IECCA 116.

¹⁹² Court of Criminal Appeal 18 May 2010.

¹⁹³ Court of Criminal Appeal 28 April 2008.

¹⁹⁴ Court of Criminal Appeal 18 May 2010.

¹⁹⁵ Court of Criminal Appeal 23 November 2009.

¹⁹⁶ The court may have been influenced by the fact that the applicant had been running a commercial operation.

¹⁹⁷ Court of Criminal Appeal 23 November 2001.

3.104 The fact that an offender is a foreign national may be considered an exceptional and specific circumstance. In this regard, the courts have recognised that a foreign national may find it more difficult than an Irish national to serve a sentence in Ireland. In *People (DPP) v Renald*,¹⁹⁸ for instance, the Court of Criminal Appeal referred to the applicant's "very different cultural and political background". In *People (DPP) v Foster*¹⁹⁹ the Court of Criminal Appeal had regard to the fact that a custodial sentence would bear more heavily on the applicant as he was a foreign national with no family, friends or connection to Ireland. Similarly, in *People (DPP) v Whitehead*²⁰⁰ the Court of Criminal Appeal had regard to the fact that a custodial sentence would separate the applicant from her young family, who would not be able to visit her because of their impoverished circumstances in South Africa. Kearns J concluded that this would constitute an "added penalty of significant dimensions on the appellant".

3.105 For similar reasons, the fact that an offender suffers from ill-health may be considered an exceptional and specific circumstance. The courts have recognised that a custodial sentence may be disproportionately severe for a person who suffers from serious health problems. Thus in *People (DPP) v Kinahan*²⁰¹ the Court of Criminal Appeal had regard to the fact that the applicant had serious health problems to amend a sentence of 10 years with two years suspended to 10 years with five years suspended. Finnegan J observed:

"[I]t is clear that imprisonment for this man will be very much harsher in its effect than it would be for someone in the full of their health and so this court has regard to the package of illnesses from which he unfortunately suffers."

3.106 Similarly, in *People (DPP) v Vardacardis*²⁰² the Court of Criminal Appeal declined to increase an 8-year sentence, 6 and a half years of which had been suspended, which had been imposed on a 65-year old, South African woman who suffered from chronic health problems.²⁰³

3.107 By contrast, in *People (DPP) v Coles*²⁰⁴ the applicant had sustained physical injuries following a road traffic accident and had become depressed when faced with the prospect of serving a significant period in prison. The court found, however, that there was "nothing in that to lessen or interfere with the appropriate sentence which should be imposed in this case". The court upheld the 15-year sentence.

Humanity

3.108 In *People (DPP) v Farrell*²⁰⁵ the DPP appealed against a sentence of 8 years with 6 years suspended on the ground that it was unduly lenient. The Court of Criminal Appeal agreed that the suspension of the final 6 years had been unduly lenient. It declined, however, to reduce the suspended portion of the sentence as the respondent had already served the custodial portion of the sentence and had been at large for almost two years. The court concluded that in the "extraordinary, specific and, it is hoped, never to be repeated circumstances" of the case it would be an "unacceptable disregard for the humanity of the respondent" to direct that he now serve the remainder of the 8-year sentence.

(iii) Aggravating Factors

3.109 Section 27(3D)(c)²⁰⁶ of the *Misuse of Drugs Act 1977*, as amended, provides that the court, when deciding whether or not to impose the statutory minimum sentence, may have regard to (i) any

¹⁹⁸ Court of Criminal Appeal 23 November 2001.

¹⁹⁹ Court of Criminal Appeal 15 May 2002.

²⁰⁰ Court of Criminal Appeal 20 October 2008.

²⁰¹ Court of Criminal Appeal 14 January 2008.

²⁰² Court of Criminal Appeal 20 January 2003.

²⁰³ In *People (DPP) v Botha* [2004] 2 IR 375 the court referred to *Vardacardis* as a very exceptional case in which a lower sentence was justified.

²⁰⁴ Court of Criminal Appeal 7 December 2009.

²⁰⁵ [2010] IECCA 116.

²⁰⁶ Formerly, section 27(3CC).

previous drug trafficking convictions and (ii) the public interest in preventing drug trafficking. Each of these factors will be considered in turn. As noted in Chapter 1, previous convictions tend to aggravate the seriousness of an offence. Arguably, also, where the public interest lies in preventing drug trafficking this is an indication of how serious the offence should be considered.

(I) *Previous Convictions for Drug Trafficking*

3.110 Section 27(3D)(c)(i)²⁰⁷ provides that the court may have regard to any previous drug trafficking offences when determining whether the statutory minimum should apply.²⁰⁸ It is unclear what purpose section 27(3D)(c)(i) serves other than to emphasise the pre-existing power of the courts to consider previous drug trafficking convictions. The courts did, in any case, have regard to previous convictions for the purpose of determining whether the statutory minimum should apply.

3.111 Smith observes that a matter of greater concern is the extent to which evidence of previous involvement in the drugs trade may be admissible. In *People (DPP) v Gilligan (No 2)*,²⁰⁹ for instance, the Court of Criminal Appeal held that the sentencing judge could not have regard to evidence of previous misconduct for which the accused had neither been charged nor convicted and which the accused had not asked to be taken into account. The court noted, however, that the sentencing court could not “act in blinkers” and was thus entitled, if not obliged, to consider the facts and circumstances surrounding each conviction.²¹⁰

3.112 In *People (DPP) v Long*²¹¹ the applicant sought leave to appeal against a sentence of 14 years. It was submitted that the trial judge had erred in admitting evidence of admissions made by the accused to offences with which he had not been charged. In this regard, the Court of Criminal Appeal, per Macken J, ruled:

“A trial or sentencing judge is fully entitled in the case where an accused has entered a plea of guilty to have regard to all background matters arising which goes to clarify or explain the context of the crime in question and which may be [of] assistance to the sentencing judge in reaching a decision as to the appropriate sentence to be imposed in a given case. This includes being able to look at and consider the entire (*sic*) of the Book of Evidence, including any admissions which may have been made by an accused... The real difficulty, recognised in the jurisprudence, arises when assessing whether, even if a trial or sentencing judge is so permitted, that judge has in fact overstepped the mark... and fallen into the trap of allowing the context or the factors, especially admissions, to influence or be taken into account in calculating the actual sentence to be imposed.”

The court concluded that the sentencing judge had not “clearly and unambiguously” avoided falling into this trap by making it clear that the admissions regarding prior involvement in the importation of drugs had not influenced the manner in which he had sentenced the applicant. It thus set aside the sentence imposed.

3.113 In *People (DPP) v Delaney*²¹² the trial judge had asked a Garda witness as to how, if there was a hierarchy of drug dealing or possession for supply, he would grade the offender on a scale of one to 10. The Court of Criminal Appeal held that this was to invite opinion evidence regarding facts entirely extraneous to the matter charged and to which the plea of guilty had been entered. The response was thus inadmissible.

²⁰⁷ Formerly, section 27(3CC)(a).

²⁰⁸ Section 27(3B) provides: “The court, in imposing a sentence on a person for an offence under section 15A or 15B of this Act, may, in particular, have regard to whether the person has a previous conviction for a drug trafficking offence.”

²⁰⁹ [2004] 3 IR 87.

²¹⁰ [2004] 3 IR 87, 91.

²¹¹ [2006] IECCA 49.

²¹² Court of Criminal Appeal 28 February 2000.

3.114 In *People (DPP) v McDonnell*²¹³ the sentencing judge had intervened during cross-examination to ask the Garda witness how long the offender had been involved in the drugs trade. The Court of Criminal Appeal held that the admission of hearsay evidence regarding previous offences for which the accused had neither been charged nor convicted and which the accused had not asked to be taken into account would infringe Article 38 of the Constitution, which provides for trial in due course of law, and Article 40.4., which provides that no citizen should be punished on any matter on which he has not been convicted. However, hearsay evidence regarding character, antecedents and background information of an offence, including the extent of the role played by the accused might, at the discretion of the sentencing judge, be admitted, subject to the requirement that if a particular fact assumed specific significance or was disputed the court's findings should require strict proof. It was then a matter for the sentencing judge to decide what weight should be attributed to the evidence as required.

3.115 Smith observes that despite this jurisprudence the dividing line between admissible and inadmissible evidence remains unclear.²¹⁴

(II) Public Interest

3.116 Section 27(3D)(c)(ii)²¹⁵ provides that the court may consider whether or not the public interest would be served by the imposition of a sentence of less than 10 years. This provision clearly echoes the words of the then Minister for Justice when he stated that the courts should keep in mind the social impact of drug trafficking when determining whether or not to impose the statutory minimum sentence.²¹⁶ It has been noted, however, that it may be difficult to determine what is in the "public interest".²¹⁷

3.117 Smith observes that the wording suggests that a court should consider that the public interest will not always be served by committing an offender to prison.²¹⁸ In *People (DPP) v McGinty*²¹⁹ the DPP appealed against a suspended sentence of five years on the ground of undue leniency. The Court of Criminal Appeal accepted that a term of imprisonment should normally be imposed but noted that where there were "special reasons of a substantial nature and wholly exceptional circumstances" a suspended sentence might be appropriate in the interests of justice.

(III) Combination of Offences

3.118 In *People (DPP) v Purcell*²²⁰ the court observed that the applicant was not only dealing in drugs in substantial amounts but that he had also possessed guns and that it was the combination of the two which was the real aggravating factor.

(d) Early Release

3.119 The power to grant early release to those who have been convicted of an offence under section 15A or section 15B of the *Misuse of Drugs Act 1977*, as amended, has been restricted. O'Malley observed that this reflected the "clear policy" of the Oireachtas that the courts should, in the absence of special circumstances, impose a prison sentence of ten years or longer and that such sentences should be served in their entirety less remission.²²¹

²¹³ Court of Criminal Appeal 3 March 2009.

²¹⁴ Smith "Sentencing Section 15A Offences" (2010) 20(1) ICLJ 8.

²¹⁵ Formerly, section 27(3CC)(b).

²¹⁶ See paragraph 3.06.

²¹⁷ Irish Current Law Statutes Annotated 2006 at 26-84.

²¹⁸ Smith "Sentencing Section 15A Offences" (2010) 20(1) ICLJ 8.

²¹⁹ [2007] 1 IR 633.

²²⁰ Court of Criminal Appeal 21 June 2010.

²²¹ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 333.

(i) Power to Commute or Remit

3.120 Section 27(3G)²²² of the *Misuse of Drugs Act 1977*, as amended, provides that the powers of commutation and remission conferred upon the Government by section 23 of the *Criminal Justice Act 1951* cannot be exercised in respect of a person sentenced for an offence under section 15A or section 15B.

(ii) Remission for Good Behaviour

3.121 Section 27(3H)²²³ provides, however, that any sentence imposed for an offence under section 15A or section 15B is subject to ordinary remission for good behaviour which currently stands at one-quarter of the total sentence.

(iii) Temporary Release

3.122 Section 27(3I)²²⁴ provides that the power to grant temporary release, as conferred by section 2 of the *Criminal Justice Act 1960*, may not be exercised until such time as the power to grant commutation or remission has arisen except “for grave reasons of a humanitarian nature”. Furthermore, the temporary release shall be for such limited period of time as is justified by those reasons. O’Malley observes that such reasons might include serious illness on the part of the offender or an immediate family member or the death of a close family member.²²⁵

(iv) Drug Addiction/Review/Suspended Sentence

3.123 Section 27(3J)²²⁶ provides that the court may list a sentence for review after the expiry of not less than half of the term specified by the court under section 27(3C)²²⁷ or section 27(3F).²²⁸ To list a sentence for review, the court must be satisfied that the offender was addicted to drugs at the time of the offence²²⁹ and that the addiction was a substantial factor leading to the commission of the offence.²³⁰ Section 27(3K)²³¹ provides that on reviewing the sentence the court may suspend the remainder of the sentence on any conditions it considers fit and having regard to any matters it considers appropriate. It is interesting to note that in *People (DPP) v Finn*²³² the Supreme Court firmly disapproved of the general practice of imposing reviewable sentences but accepted that sentences imposed for offences under section 15A might continue to have review elements because of the specific statutory authorisation.

3.124 In *People (DPP) v Heaphy*²³³ the applicant had neither pleaded guilty nor cooperated with the Gardaí. In the absence of any other exceptional or specific circumstance the sentencing judge had imposed a sentence of 10 years. Having regard to the fact that the applicant was a drug addict, the Court of Criminal Appeal held that the sentencing judge had erred in failing to refer to section 27(3J) and ordered that the applicant’s sentence be reviewed after five years.

²²² Formerly, section 27(3D).

²²³ Formerly, section 27(3E).

²²⁴ Formerly, section 27(3F).

²²⁵ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 333.

²²⁶ Now section 15(3J) after the enactment of section 33 of the *Criminal Justice Act 2007*.

²²⁷ Formerly, section 27(3B).

²²⁸ Section 27(3F) provides that where a person has been convicted of a second or subsequent offence under section 15A or section 15B the court *must* impose a 10-year sentence.

²²⁹ Section 27(3J)(a) of the *Misuse of Drugs Act 1977*, as amended.

²³⁰ Section 27(3J)(b) of the *Misuse of Drugs Act 1977*, as amended.

²³¹ Formerly, section 27(3H).

²³² [2001] 2 IR 25.

²³³ Court of Criminal Appeal 18 May 2010.

3.125 In *People (DPP) v Dunne*²³⁴ the Court of Criminal Appeal held that the review power was only available in circumstances where the mandatory minimum sentence had been passed and not where the court had imposed a lesser sentence on the ground that there were exceptional and specific circumstances. O'Malley observes that this could lead to the "illogical" consequence of a person subject to the statutory minimum sentence being in a better position than a person not subject to the statutory minimum.²³⁵ He also notes that the purpose of the review provision is rehabilitative and, as such, should be available to all drug addicts irrespective of the length of the sentence imposed on them.²³⁶

3.126 The review power remains following the amendment to section 27²³⁷ which imposes a mandatory minimum sentence of 10 years, without exception, where the offender is convicted of a second or subsequent offence under section 15A or section 15B.

(3) Discussion

3.127 The application of a presumptive minimum sentence to offences under section 15A has been criticised in a number of respects. While there has been little by way of commentary on its application to offences under section 15B, it is clear that many of these criticisms could equally apply to offences under section 15B.

3.128 In the first respect, it has been asserted that the presumptive minimum sentence severely constrains judicial discretion and thereby increases the risk of disproportionate sentencing. In *People (DPP) v Heffernan*,²³⁸ for instance, Hardiman J observed:

"It has to be realised that the effect of the statute is to trammel judicial discretion in a case such as this and that the Oireachtas have, *for reasons that seem to them sufficient*, indicated a minimum sentence of a substantial nature in respect of these offences. They have presumably in doing so considered the fact that such sentences might be regarded as harsh in certain circumstances and on certain individuals. In this Court we have to attend to the determination of the Oireachtas as expressed in the statutory language and not permit it to be gainsaid except in circumstances which the statute itself envisaged."²³⁹ [Emphasis added]

3.129 Second, it has been noted that mandatory sentencing causes sentencing discretion to be transferred, in practice if not in terms of the language of the legislation itself, from the courts to the prosecution and the defence. This is problematic in so far as the DPP's discretion is exercised behind closed doors rather than in open court.

3.130 Third, it has been asserted that the presumptive minimum sentence is a "one-strike" rule. In this regard, O'Malley observes that by contrast to the "three-strike" laws enacted in some US states section 27 does not require the accused to have a previous conviction for drug dealing or anything else before the presumptive minimum may apply.²⁴⁰

3.131 Fourth, it has been observed that the majority of those being caught for offences under section 15A are drug couriers rather than drug "barons."²⁴¹ In this regard, O'Malley notes that the offenders are predominantly "victims of circumstance" who are either impoverished individuals from African countries or

²³⁴ [2003] 4 IR 87.

²³⁵ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 334.

²³⁶ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 334.

²³⁷ As inserted by section 84 of the *Criminal Justice Act 2006*, re-numbered by section 33 of the *Criminal Justice Act 2007*.

²³⁸ Court of Criminal Appeal 10 October 2002.

²³⁹ In *People (DPP) v Dermody* [2007] 2 IR 622, 625, Hardiman J observed that the right of appeal, whether by the accused or the prosecutor, was an essential safeguard against undue severity or leniency particularly in the context of offences under section 15A.

²⁴⁰ O'Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 340.

²⁴¹ It is possible that the same situation could arise with regard to offences under section 15B.

underprivileged Irish citizens.²⁴² In 2006, he argued that a comprehensive survey of those being sentenced for offences under section 15A was urgently required.²⁴³ To date there has been no such survey.

3.132 Fifth, it has been asserted that mandatory sentencing regimes are not a justifiable means of reducing drug consumption or drug-related crime in terms of cost-effectiveness. In this regard, the Rand Corporation noted that for the same amount of money a more effective method would be to strengthen enforcement under the previous sentencing regime or to increase treatment of heavy drug-users.²⁴⁴

3.133 Finally, it has been asserted that there is an incongruence between the sentences applicable to drugs offences and the sentences applicable to firearms offences. In this regard, Smith observes:

“[A]s a sentencing procedure [sentencing section 15A offences] can lead to unfairness for those who come before the courts. Whilst it is accepted that the dangers of drugs and their threat to society can never be underestimated, it is unclear why those who are caught with firearms are only subject to a presumptive mandatory sentence of five years. Whereas, those vulnerable persons in society who are used as couriers are subject to the presumptive 10 year mandatory minimum. It is accepted that the exceptional and specific circumstances do tend to guide judges away from the 10 years in appropriate circumstances, but nonetheless the figure is constantly present in [the] sentencing judge’s mind.”²⁴⁵

3.134 As Smith observes the issue is all the more concerning when one considers that most of those being caught under section 15A are low-level offenders rather than high-level offenders.²⁴⁶

C Firearms Offences

(1) History

3.135 The *Criminal Justice Act 2006* amended the *Firearms Acts* with the result that many firearms offences now carry a presumptive sentence of five or 10 years. The offences which attract a five-year sentence are possession of a firearm while taking a vehicle without authority;²⁴⁷ possession of a firearm or ammunition in suspicious circumstances;²⁴⁸ carrying a firearm or imitation firearm with intent to commit an indictable offence or resist arrest;²⁴⁹ and shortening the barrel of a shotgun or rifle.²⁵⁰ The offences which attract a 10-year sentence are possession of firearms with intent to endanger life;²⁵¹ and using a firearm to assist or aid in an escape.²⁵²

²⁴² O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 340-341.

²⁴³ O’Malley *Sentencing Law and Practice* (Thomson Round Hall, 2nd ed, 2006) at 340-341.

²⁴⁴ Rand Corporation “Are Mandatory Minimum Drug Sentences Cost-Effective?” 1997.

²⁴⁵ Smith “Sentencing Section 15A Offences” (2010) 20(1) ICLJ 8. See also O’Malley “Presumptive Minimum Sentences for Assault Offences found Constitutional in France” 15 March 2011 Ex Tempore blog: www.extempore.ie.

²⁴⁶ In *People (DPP) v Purcell* Court of Criminal Appeal 21 June 2010, Denham J noted that opinion was divided as to whether the drug offences or the firearms offences in the case were more serious but that the drug offences carried a prescriptive minimum term of 10 years whereas the firearms offences carried a prescriptive term of 5 years.

²⁴⁷ Section 57 of the *Criminal Justice Act 2006* replaces section 26 of the *Firearms Act 1964*.

²⁴⁸ Section 59 of the *Criminal Justice Act 2006* replaces section 27A of the *Firearms Act 1964*.

²⁴⁹ Section 60 of the *Criminal Justice Act 2006* replaces section 27B of the *Firearms Act 1964*.

²⁵⁰ Section 65 of the *Criminal Justice Act 2006* inserts section 12A into the *Firearms and Offensive Weapons Act 1990*.

²⁵¹ Section 42 of the *Criminal Justice Act 2006* replaces section 15 of the *Firearms Act 1925*.

²⁵² Section 58 of the *Criminal Justice Act 2006* replaces section 27 of the *Firearms Act 1964*.

3.136 The *Criminal Justice Act 2006*, in so far as it continued the trend started by the *Criminal Justice Act 1999*, marked an important development in the evolution of sentencing. Whereas presumptive sentencing had previously been limited to the offence of possessing drugs with intent to sell or supply, it now applied to a range of drug and firearms offences. As a result there were now 8 types of offence for which judicial discretion regarding sentencing would be constrained. The Commission observes, however, that the fact that presumptive sentencing was limited to such a specific range of offences gives rise to the inference that (a) presumptive sentencing was intended to apply in the relatively narrow circumstances of addressing a major challenge to society (such as in the case of certain drugs and firearms offences) and (b) general judicial sentencing discretion was accepted as suitable in other cases.

3.137 In 2007, the *Criminal Justice Act 2007* inserted the following subsection²⁵³ into the sections²⁵⁴ of the *Firearms Acts* which had created the offences to which the presumptive sentences applied:

“The purposes of subsections (5) and (6)²⁵⁵ of this section is to provide that *in view of the harm caused to society by the unlawful possession and use of firearms*, a court, in imposing sentence on a person (except a person under the age of 18 years) for an offence under this section, shall specify as the minimum term of imprisonment to be served by the person a term of not less than 10 years, unless the court determines that by reason of exceptional and specific circumstances relating to the offence, or the person convicted of it, it would be unjust in all the circumstances to do so.” [Emphasis added]

It has been noted that the purpose of this provision was to reduce the number of situations in which the courts could impose sentences below the presumptive minimum by making clear the Oireachtas’s intention that the presumptive minimum sentence was to be imposed in all but the most exceptional cases.²⁵⁶

3.138 There had been calls to introduce mandatory sentencing for firearms offences long before the enactment of the *Criminal Justice Act 2006*. Calls for “mandatory minimum” sentences for firearms offences were first heard by the Dáil in 1986²⁵⁷ but were dismissed by the Minister for Justice on the basis of possible constitutional problems and the lack of public appetite. A general call for more robust measures against firearms offences was also rejected the following year.²⁵⁸

3.139 In July 1996, following the murders of Garda Gerry McCabe and Veronica Guerin, the Opposition moved a private members’ motion in which they called on the Government to consider, among other matters, the introduction of mandatory minimum sentences for the use of illegal firearms.²⁵⁹ The murders were reputed to have been committed by members of subversive and criminal organisations at a time when an apparently burgeoning criminal underworld weighed heavily in the public consciousness.²⁶⁰

²⁵³ Section 35 to section 39 of the *Criminal Justice Act 2006* inserted subsection (4A) into section 15 of the *Firearms Act 1925*; section 26 of the *Firearms Act 1964*; section 27 of the *Firearms Act 1964*; section 27A of the *Firearms Act 1964*; and section 27B of the *Firearms Act 1964*. Section 40 of the *Criminal Justice Act 2006* inserted subsection (9A) into section 12A of the *Firearms and Offensive Weapons Act 1990*.

²⁵⁴ Section 15 of the *Firearms Act 1925*; section 26 of the *Firearms Act 1964*; section 27 of the *Firearms Act 1964*; section 27A of the *Firearms Act 1964*; section 27B of the *Firearms Act 1964* and section 12A of the *Firearms and Offensive Weapons Act 1990*.

²⁵⁵ Section 12A(9A) of the *Firearms and Offensive Weapons Act 1990* refers to subsections (10) and (11) rather than (5) and (6).

²⁵⁶ McIntyre *Irish Current Law Statutes Annotated 2007* at 29-43.

²⁵⁷ Dáil Debates 1986 Vol 366, cols 2108-9.

²⁵⁸ Dáil Debates 1987 Vol 374 Written Answer 71.

²⁵⁹ Private Members’ Business - Measures against Crime: Motion, Dáil Debates, Vol 467 No 7, Wednesday, 2 July 1996, Liz O’Donnell TD; “Coalition to present Anti-Crime Package later Today” *Irish Times* 2 July 1996.

²⁶⁰ “Mayor calls for Action on Guns” *Irish Times* 15 August 1996; “The Law and Justice” *Irish Times* 13 September 1996; “69 Guns seized during Guerin Murder Inquiries” *Irish Times* 9 September 1996; “Garda are

The notoriety of these criminal organisations had grown as details of their exploits filtered into the public domain. Their revenue was derived primarily from drug trafficking - a territorial business which was guarded both jealously and ruthlessly. The link between the drugs trade and firearms had become evident as a proliferation of illegal firearms meant that tales of a lethal turf-war were never far from the headlines. Competitors, traitors, potential threats and people in the wrong place at the wrong time were casually and frequently eliminated.²⁶¹ While the identities of the criminal bosses were known or, at very least, suspected the sophisticated level at which they operated made detection and prosecution almost impossible. The fact that representatives of two democratic institutions - the Garda Síochána and the Press - should be targeted within such a short space of time was considered by some to be an “attack on democracy” and proof that the crime situation now required a declaration of a “state of emergency”.²⁶² The climate seemed right to come down heavily on the activities of these organisations. The Government declined, however, to introduce mandatory sentencing in respect of either drug trafficking or firearms offences, preferring instead to focus on the causes of crime, Garda powers and the proceeds of crime.²⁶³

3.140 In April 2004 the Minister for Justice announced to the Association of Garda Sergeants and Inspectors that the laws relating to drugs and firearms offences would be strengthened.²⁶⁴ A number of events seemed to precipitate this announcement. In November 2003, the Department of Justice had released figures to the Labour spokesperson on justice which indicated that there had been a 500% increase in murders involving firearms since 1998.²⁶⁵ Prior to that, a newly appointed Garda Commissioner, Noel Conroy, who had addressed the Joint Committee on Justice, Equality, Defence and Women’s Rights, explained the extent of the perceived problem:

“I am concerned at the number of homicides and other instances involving the use of firearms. Of the 42 deaths this year, 19 involved the use of firearms. This compares to ten in the year 2002 and nine in the year 2001. There are a number of factors which explain this increase. Some former paramilitary weapons have found their way into the hands of criminal organisations and this has contributed to the general increase in the use of firearms in recent times, in particular in so-called gangland style murders and shootings. There have also been cases where former paramilitaries have turned to crime. Criminal gangs are also known to import firearms with their consignments of drugs and cigarettes and so on.”²⁶⁶

3.141 In April 2004, shortly after the Minister’s announcement, two reports were published which lent credence to popular fears. On 16th April 2004 the Department of Justice released Garda figures which indicated that there had been a substantial increase in firearms offences for the first three months of 2004.²⁶⁷ This was followed by the publication, on 19th April 2004, of an all-Ireland survey, commissioned

now closing in on Guerin Murderers” Irish Times 9 October 1996; Maher “Murdered Drug Dealer linked to two Killings in Dublin” Irish Times 9 December 1996.

²⁶¹ “Contract Killing costs about Pounds 2000” Irish Times 1 May 1996; O’Connor “Death Toll from Contract Style Killings rises to 12 in Dublin” Irish Times 27 1996; Cusack “Dublin’s Gangsters have got the Killing Habit” Irish Times 7 September 1996;

²⁶² Killing of Dublin Journalist: Statements Dáil Debates, Vol 467 No 5, Wednesday, 26 June 1996; Kennedy “Stunned Political Leaders see Killing as Attack on Democracy” Irish Times 27 June 1996.

²⁶³ See, for example, the *Criminal Assets Bureau Act 1996* and the *Proceeds of Crime Act 1996*.

²⁶⁴ Lally “Gun and Drug Laws to be Toughened Up” Irish Times 6 April 2004; “Mandatory Sentences” Irish Times 7 April 2004; Coulter “Sentence must be Proportionate to the Crime, say Observers” Irish Times 7 April 2004.

²⁶⁵ Lally “500% Rise in Murders using Guns” Irish Times 19 November 2003.

²⁶⁶ Garda Commissioner: Presentation Joint Committee on Justice, Equality, Dfence and Women’s Rights Debate, Tuesday, 14 October 2003, Garda Commissioner Noel Conroy; Lally “Conroy says Rise in Use of Guns in Homicides” Irish Times 15 October 2003; Lally “Gardaí call for Overhaul of Justice System” Irish Times 6 November 2003.

²⁶⁷ Lally “Crime Figures show 6% Drop” Irish Times 17 April 2004; Brady “Crackdown on Way as Gun Crime Rockets” Belfast Telegraph 17 April 2004

by the National Advisory Committee on Drugs (NACD) in Ireland and the Drug and Alcohol Information and Research Unit (DAIRU) in Northern Ireland, which illustrated the extent to which drug misuse had become a serious problem in Ireland.²⁶⁸ Commenting on the all-Ireland survey, the Minister for Justice stated that the courts “must adopt a tough approach to criminals convicted of drugs or firearms offences, the two of which were inextricably linked.”²⁶⁹ In an apparent reference to the presumptive sentence for offences under section 15A of the *Misuse of Drugs Act 1977* he commented:

“Our judiciary must understand when the Oireachtas put in place guidelines for the sentencing of people convicted for the commercial distribution of drugs that the parliament was serious and required deterrent sentences in that area, and did not expect that the system of penalties provided was to be regarded as the exception rather than the rule.”²⁷⁰

3.142 In 2004 the Government introduced the *Criminal Justice Bill 2004*.²⁷¹ During the second stage of debates the Government announced that it would be introducing a number of substantial amendments which would, among other matters, provide presumptive sentences for certain firearms offences.²⁷² The amendments were finalised following the fatal shooting of Donna Cleary in March 2006.²⁷³

3.143 At the same time the idea that presumptive sentencing could be used to tackle firearms offences had gained momentum in the UK which had introduced similar sentencing provisions in the *Criminal Justice Act 2003*. This will be discussed in greater detail in Section D.

(2) Application

3.144 To examine the application of the presumptive sentencing regime under the *Firearms Acts* it is necessary to consider first the elements of the offences to which it applies.²⁷⁴

(a) Elements of the Offences under the Firearms Acts

(i) Section 15 of the Firearms Act 1925

3.145 Section 15 of the *Firearms Act 1925*, as amended,²⁷⁵ provides that it is an offence to possess or control any firearm or ammunition (a) with intent to endanger life or cause serious injury to property, or (b) with intent to enable any other person by means of the firearm or ammunition to endanger life or cause serious injury to property, regardless of whether any injury to person or property has actually been caused. As the Court of Criminal Appeal has not examined section 15 in recent times, it is difficult to determine the exact implications of the elements of the offence.

(I) Possession or Control

3.146 Neither the term “possession” nor the term “control” is defined by the 1964 Act. As noted in paragraphs 3.23 to 3.26, however, the term “possession” comprises actual possession, which denotes having custody and control over an article, and constructive possession, which denotes having control but

²⁶⁸ Drug Use in Ireland and Northern Ireland: 2002/2003 Drug Prevalence Survey (Health Board (Ireland) and Health and Social Services Board (Northern Ireland), April 2004); and Lally “Report to Show Drug Trade has spread throughout State” Irish Times 19 April 2004.

²⁶⁹ Lally “All-Ireland Survey Shows Fast Rise in Use of Cocaine” Irish Times 20 April 2004; McDaid “Minister Vows to Get Tough on Drugs” Irish News 20 April 2004.

²⁷⁰ Lally “All-Ireland Survey Shows Fast Rise in Use of Cocaine” Irish Times 20 April 2004.

²⁷¹ Criminal Justice Bill 2004: Order for Second Stage Dáil Debate, Vol 597 No 5, Tuesday, 15 February 2005.

²⁷² Criminal Justice Bill 2004: Second Stage Dáil Debate, Vol 597 No 5, Tuesday, 15 February 2005.

²⁷³ 6 March 2003. Robinson “Calls for Gun-Crime Crackdown as Killings leave Public Reeling” Irish News 8 March 2006; “Time for Action, not Words, on Guns” Irish Times 7 March 2006; O’Halloran “Harney says Firearms Laws will be Amended” Irish Times 9 March 2006; McMorrow “Ireland in the Grip of Gun Crime” Sunday Tribune 12 March 2006.

²⁷⁴ None of the offences require that the firearms, imitation firearms or ammunition be illegally held.

²⁷⁵ Section 42 of the *Criminal Justice Act 2006*.

not custody.²⁷⁶ The fact that the terms “possession” and “control” are separated by the conjunction “or” serves to emphasise that either custody of or dominion over the firearms or ammunition will suffice for an offence under section 15.

3.147 Thus, in theory, section 15 should be broad enough to describe the activities of both high-level and low-level offenders. On the one hand, the high-level offenders, who are in charge of the operations, may be said to exercise constructive possession as they have ultimate control over those transporting the firearms or ammunition on their behalf. On the other hand, the low-level offenders, who transport the firearms or ammunition, may be said to have actual possession as they have some level of control over the firearms or ammunition of which they have custody. As noted in paragraph 3.26, however, the reality is that it is easier to detect and prove actual possession than it is to detect or prove constructive possession. Thus it is likely that more low-level offenders than high-level offenders will be caught for offences under section 15.

(II) *Intent to Endanger Life or Cause Serious Injury to Property or Intent to Enable any other Person by means of the Firearm or Ammunition to Endanger Life or Cause Serious Injury to Property*

3.148 Possession or control must be coupled with either (a) intent to endanger life or cause serious injury to property, or (b) intent to enable any other person by means of the firearm or ammunition to endanger life or cause serious injury. Thus the person who possesses or controls the firearms or ammunition must intend, personally, to endanger life or cause serious injury to property or to enable someone else to do so. Thus, for example, a courier who does not harbour a personal intention to endanger life or cause serious injury to property may still be found guilty of an offence under section 15. It is undeniable that in most cases the provision of firearms or ammunition to another person enables that person to endanger life or cause serious injury to property regardless of whether that person chooses to do so in the end. It is arguable that this inference is even stronger where that person is already involved in serious crime and has, perhaps, requested the consignment of firearms or ammunition. Section 15 thus provides very little wriggle room to the would-be courier.

(ii) **Section 26 of the Firearms Act 1964**

3.149 Section 112(1) of the *Road Traffic Act 1961* prohibits a person from using or taking possession of a mechanically propelled vehicle without the consent of the owner. Section 26(1) of the *Firearms Act 1964*, as amended,²⁷⁷ provides that a person who contravenes section 112(1) of the *Road Traffic Act 1961* and who, at the time of the contravention, has with him or her a firearm or imitation firearm is guilty of an offence. Again, it is difficult to determine the exact implications of the elements of an offence under section 26 as the Court of Criminal Appeal has not examined section 26 in recent times.

(I) *Using or Taking a Mechanically Propelled Vehicle*

(aa) *Using or Taking*

3.150 Section 3(1) of the *Road Traffic Act 1961* provides that the term “use”, in relation to a vehicle, includes park, which means to keep or leave stationary. Presumably, however, the term “use” also includes “driving”, which means to manage and control and, in relation to a bicycle or tricycle, to ride. In relation to a vehicle, at any rate, it is conceivable that a person could manage and control the vehicle without personally operating the vehicle. Thus, for example, a person might manage and control a vehicle where he or she forces the owner to drive by holding a firearm to his or her head.

3.151 The term “take” is not defined by the 1961 Act. A narrow definition of the term might refer to taking *custody* whereas a broader definition might refer to taking *possession* which, as noted in paragraphs 3.23 to 3.26, is not limited to having custody. The narrow definition of take implies that the person must have physical custody of the vehicle whereas the broader definition would allow for situations in which the person does not have physical custody, such as where the person, at a remote location from the vehicle, forces the owner to drive by threatening his or her family with a firearm.

²⁷⁶ McAuley and McCutcheon *Criminal Liability* (Round Hall, Sweet and Maxwell, 2000) at 208-209.

²⁷⁷ Section 57 of the *Criminal Justice Act 2006*.

(bb) *Mechanically Propelled Vehicle*

3.152 Section 3(1) of the *Road Traffic Act 1961* provides that the term “mechanically propelled vehicle” means a vehicle intended or adapted for propulsion by mechanical means. This includes (a) a bicycle or tricycle with an attachment for propelling it by mechanical power, whether or not the attachment is being used, and (b) a vehicle the means of propulsion of which is electrical or partly electrical and partly mechanical. It does not, however, include a tramcar or other vehicle running on permanent rails.

(II) *Having with Him or Her a Firearm or Imitation Firearm*

(aa) *Having with Him or Her*

3.153 The term “have” is not defined by the 1964 Act. The fact that the term is used with the words “with him or her” suggests, however, that the offender must have actual possession of the firearm or imitation firearm at the time he or she is taking the particular vehicle.

(bb) *A Firearm or Imitation Firearm*

3.154 Section 1(1) of the *Firearms Act 1925*, as amended,²⁷⁸ provides that the term “firearm” means (a) a lethal firearm or other lethal weapon of any description from which any shot, bullet or other missile can be discharged; (b) an air gun (including an air rifle and air pistol) with a muzzle energy greater than one joule or any other weapon incorporating a barrel from which any projectile can be discharged with such a muzzle energy; (c) a crossbow; (d) any type of stun gun or other weapon causing any shock or other disablement to a person by means of electricity or any other kind of energy emission; (e) a prohibited weapon;²⁷⁹ and (f) any article which would be a firearm under any of the foregoing paragraphs but for the fact that, owing to the lack of necessary component part or parts, or to any other defect or condition, it is incapable of discharging a shot, bullet or other missile or projectile or of causing a shock or other disablement; and (g) except where the context otherwise requires, includes a component part of any article referred to in section 1.

3.155 The term “imitation firearm” is not defined by the Act. Presumably, however, the term includes any article which is calculated or reasonably likely to give the person perceiving it to believe that it is a real firearm. As noted by Finnegan J in *People (DPP) v Clai*²⁸⁰ it makes very little difference to a person who, in the course of a crime, is confronted with a weapon that, unbeknownst to him or her, is non-functioning. The crucial issue is that an imitation firearm may be an equally effective means of threatening a person and/or pursuing an ulterior objective.

(iii) **Section 27 of the Firearms Act 1964**

3.156 Section 27 of the *Firearms Act 1964*, as amended,²⁸¹ prohibits the use or production of a firearm or imitation firearm for the purpose of resisting arrest²⁸² or aiding escape or rescue of the person or another person from lawful custody.²⁸³ As the Court of Criminal Appeal has not examined section 27 in recent times, it is difficult to determine the exact implications of the elements of the offence.

(I) *Use or Production of a Firearm or Imitation Firearm*

(aa) *Use or Production*

²⁷⁸ Section 26 of the *Criminal Justice Act 2006*.

²⁷⁹ Section 1 of the *Firearms Act 1925* provides that the term “prohibited weapon” means and includes “any weapon of whatever description designed for the discharge of any noxious liquid, noxious gas, or other noxious thing, and also any ammunition (whether for any such weapon as aforesaid or for any other weapon) which contains or is designed or adapted to contain any noxious liquid, noxious gas, or other noxious thing.”

²⁸⁰ Court of Criminal Appeal 9 February 2009.

²⁸¹ Section 58 of the *Criminal Justice Act 2006*.

²⁸² Section 27(1)(a) of the *Firearms Act 1964*, as amended.

²⁸³ Section 27(1)(b) of the *Firearms Act 1964*, as amended.

3.157 Neither the term “use” nor the term “produce” is defined by the 1964 Act. The ordinary meaning of the term “use” is to take, hold, deploy or employ.²⁸⁴ In *People (DPP) v Curtin*²⁸⁵ the Court of Criminal Appeal referred to the “use” of the firearm in terms of it having been discharged. The ordinary meaning of the term “produce” is to show or provide for consideration, inspection or use.²⁸⁶ The fact that the terms “use” and “produce” are separated by the conjunction “or” suggests that either use or production will suffice for an offence section 27. Thus a firearm need not be discharged but may be merely shown for the purpose of section 27.

(bb) Firearm or Imitation Firearm

3.158 The meaning of the terms “firearm” and “imitation firearm” have been considered at paragraphs 3.154 to 3.155.

(II) For the Purpose of Resisting Arrest or Aiding Escape or Rescue

3.159 The person using or producing the firearm or imitation firearm must be pursuing the objective of resisting arrest, aiding his or her escape or rescue, or aiding the escape or rescue of another person.

(iv) Section 27A of the Firearms Act 1964

3.160 Section 27A of the *Firearms Act 1964*, as amended,²⁸⁷ provides that it is an offence for a person to possess or control a firearm in circumstances that give rise to a reasonable inference that the person does not possess or control it for a lawful purpose, unless the person does possess or control it for such a purpose. The Court of Criminal Appeal has considered section 27A on a number of occasions but as there was a guilty plea in each case the Court did not have an opportunity to examine the exact implications of the elements of an offence under section 27A.²⁸⁸

(I) Possession or Control of a Firearm

(aa) Possession or Control

3.161 The meaning of the terms “possession” and “control” have been considered at paragraphs 3.23 to 3.26.

(bb) Firearm

3.162 The meaning of the term “firearm” has been considered at paragraph 3.154. It should be noted, however, that section 27A may be distinguished from the other provisions of the 1964 Act in so far as it does not refer to imitation firearms.

(II) Circumstances that give rise to a Reasonable Inference that Possession or Control is not for a Lawful Purpose

3.163 While this expression is not explained by the 1964 Act, it is clear that what is contemplated is that the circumstances surrounding the possession or control would allow a reasonable person to objectively conclude that the possession or control is for the purpose of pursuing an unlawful act. The act of possessing or controlling the firearm may not be the unlawful act contemplated because, as noted at paragraph 3.144, a person may be legally entitled to possess or control a firearm.

²⁸⁴ The New Oxford Dictionary of English (Oxford University Press, 2001) at 2038.

²⁸⁵ Court of Criminal Appeal, 21 June 2010.

²⁸⁶ The New Oxford Dictionary of English (Oxford University Press, 2001) at 1479.

²⁸⁷ Section 59 of the *Criminal Justice Act 2006*.

²⁸⁸ *People (DPP) v Barry* Court of Criminal Appeal 23 June 2008; *People (DPP) v Clail* Court of Criminal Appeal 9 February 2009; *People (DPP) v Dwyer* Court of Criminal Appeal 9 February 2009; *People (DPP) v Walsh* Court of Criminal Appeal 17 December 2009; *People (DPP) v Curtin* Court of Criminal Appeal 21 June 2010; *People (DPP) v Fitzgerald* Court of Criminal Appeal 21 June 2010; *People (DPP) v Kelly* Court of Criminal Appeal 28 June 2010; and *People (DPP) v Purcell* Court of Criminal Appeal 21 June 2010.

(v) Section 27B of the Firearms Act 1964

3.164 Section 27B of the *Firearms Act 1964*, as amended,²⁸⁹ provides that it is an offence for a person to have with him or her a firearm, or an imitation firearm, with intent to commit an indictable offence or to resist or prevent arrest of the person or another person. Again, the Court of Criminal Appeal has considered section 27B on a number of occasions but as there was a guilty plea in each case the Court did not have an opportunity to examine the exact implications of the elements of an offence under section 27B.²⁹⁰

(I) *Have with Him or Her a Firearm or Imitation Firearm*

(aa) *Have*

3.165 The meaning of “have” has been considered at paragraph 3.153. It should be noted, however, that by contrast to section 27, which creates the offence of *using or producing* a firearm or imitation firearm for the purpose of resisting arrest, section 27B creates the offence of *having* a firearm or imitation firearm, regardless of whether it is used or produced, for the purpose of resisting arrest. Thus the fact that an offender has a firearm or imitation firearm on his or her person may be sufficient for section 27B.

(bb) *Firearm or Imitation Firearm*

3.166 The meaning of the terms “firearm” and “imitation firearm” have been considered at paragraphs 3.154 and 3.155.

(II) *Intent to Commit an Indictable Offence or to Resist or Prevent Arrest*

3.167 While this expression has not been explained in the 1964 Act, it is clear that what is contemplated is that the offender should have with him or her a firearm or imitation firearm *for the purpose of* committing an indictable offence or resisting or preventing arrest.²⁹¹ Thus having the firearm is an element of the overall plan to commit an offence or resist or prevent arrest.

(vi) Section 12A of the Firearms and Offensive Weapons Act 1990

3.168 Section 12A of the *Firearms and Offensive Weapons Act 1990*, as amended, provides that it is an offence for a person to shorten the barrel of a shot-gun to a length of less than 61 centimetres²⁹² or a rifle to a length of less than 50 centimetres.²⁹³ This provision needs little explanation. The mere act of shortening the barrel of a shot-gun or rifle is an offence, regardless of whether there is criminal intent.²⁹⁴

(b) Penalties for the Offences under the Firearms Acts

3.169 The presumptive sentencing regime under the *Firearms Acts* is modelled on the presumptive sentencing regime under the *Misuse of Drugs Act 1977*. Thus many of the observations, outlined in respect of the presumptive sentence applicable to offences under the *Misuse of Drugs Act 1977* equally apply to the presumptive sentences applicable to offences under the *Firearms Acts*.

²⁸⁹ Section 60 of the *Criminal Justice Act 2006*.

²⁹⁰ *People (DPP) v Heelan* Court of Criminal Appeal 14 April 2008; *People (DPP) v Kelly* Court of Criminal Appeal 9 November 2009; and *People (DPP) v Donovan* Court of Criminal Appeal 28 June 2010.

²⁹¹ It is arguable, however, that the provision is broad enough to cover situations in which the offender has a firearm or imitation firearm and an unconnected intention to commit an indictable offence or resist or prevent arrest.

²⁹² Section 12A(1)(a) of the *Firearms and Offensive Weapons Act 1990*, as amended.

²⁹³ Section 12A(1)(b) of the *Firearms and Offensive Weapons Act 1990*, as amended.

²⁹⁴ The Court of Criminal Appeal has considered section 12A in *People (DPP) v Kelly* Court of Criminal Appeal 24 November 2008; and *People (DPP) v McCann* Court of Criminal Appeal 13 October 2008.

(i) Presumptive Minimum Sentence of Five Years' or 10 Years' Imprisonment

3.170 As noted in paragraph 3.135, the offences which attract a five-year presumptive minimum sentence are possession of a firearm while taking a vehicle without authority;²⁹⁵ possession of a firearm or ammunition in suspicious circumstances;²⁹⁶ carrying a firearm or imitation firearm with intent to commit an indictable offence or resist arrest;²⁹⁷ and shortening the barrel of a shotgun or rifle.²⁹⁸ Each of these offences - with the exception of the offence of shortening the barrel of a shotgun or rifle which is subject to a maximum sentence of 10 years²⁹⁹ - is subject to a maximum sentence of 14 years.³⁰⁰ The offences which attract a 10-year presumptive minimum sentence are possession of firearms with intent to endanger life,³⁰¹ and using a firearm to assist or aid in an escape.³⁰² These offences are subject to a maximum sentence of life imprisonment.³⁰³

3.171 As observed by the Court of Criminal Appeal in relation to the *Misuse of Drugs Act 1977*, the presumptive minimum sentence should not be used as a benchmark but may be a useful guide as to the gravity of the offences under the *Firearms Acts*. Thus in *People (DPP) v Fitzgerald*³⁰⁴ the Court of Criminal Appeal ruled that the trial judge had erred in principle by attributing insufficient weight to section 27A of the *Firearms Act 1964* which provided for a presumptive minimum sentence of five years.

3.172 Furthermore, the fact that the statute provides for a maximum sentence should not be ignored. The significance of the statutory maximum was illustrated in the case of *People (DPP) v McCann*.³⁰⁵ Macken J observed that the trial judge had imposed a sentence of 7 years, having been erroneously advised that the maximum sentence for an offence under section 12A of the *Firearms and Offensive Weapons Act 1990* was 14 years when it was, in fact, 10 years. Respecting the trial judge's intention to impose a sentence midway between the minimum and maximum sentence, the Court of Criminal Appeal reduced the sentence from 7 to five years.

3.173 Presumably, as observed by the Court of Criminal Appeal in relation to the *Misuse of Drugs Act 1977*, the courts are obliged to have regard to the presumptive minimum sentence even where it does not apply.

(ii) Mitigating Factors: Exceptional and Specific Circumstances

3.174 In each of the provisions outlined at paragraph 3.136, subsection (5)³⁰⁶ provides that the presumptive minimum sentence does not apply where the court is satisfied that there are exceptional and specific circumstances relating to the offence, or the person convicted of the offence, which would make a sentence of not less than five years' or 10 years' imprisonment unjust in all the circumstances. Exceptional and specific circumstances may include "any matters [the court] considers appropriate"

²⁹⁵ Section 57 of the *Criminal Justice Act 2006* inserts a new section 26 into the *Firearms Act 1964*.

²⁹⁶ Section 59 of the *Criminal Justice Act 2006* replaces section 27A of the *Firearms Act 1964*.

²⁹⁷ Section 60 of the *Criminal Justice Act 2006* replaces section 27B of the *Firearms Act 1964*.

²⁹⁸ Section 65 of the *Criminal Justice Act 2006* inserts section 12A into the *Firearms and Offensive Weapons Act 1990*.

²⁹⁹ Section 12A of the *Firearms and Offensive Weapons Act 1990*, as amended.

³⁰⁰ Section 26(2)(a) of the *Firearms Act 1964*, as amended; section 27A(2)(a) of the *Firearms Act 1964*, as amended; and section 27B(2)(a) of the *Firearms Act 1964*, as amended.

³⁰¹ Section 42 of the *Criminal Justice Act 2006* replaces section 15 of the *Firearms Act 1925*.

³⁰² Section 58 of the *Criminal Justice Act 2006* replaces section 27 of the *Firearms Act 1964*.

³⁰³ Section 15(2)(a) of the *Firearms Act 1925*, as amended; and section 27(2)(a) of the *Firearms Act 1964*, as amended.

³⁰⁴ Court of Criminal Appeal 21 June 2010.

³⁰⁵ Court of Criminal Appeal 13 October 2008.

³⁰⁶ Subsection (10) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

including whether the person has pleaded guilty to the offence and whether the person has materially assisted in the investigation of the offence. As noted in Chapter 1, a guilty plea and material assistance are, in general, considered to be factors which mitigate the severity of sentence rather than the seriousness of an offence.

(I) *Guilty Plea*

3.175 Subsection (5)(a)³⁰⁷ of each provision provides that a guilty plea may be considered an exceptional and specific circumstance for the purpose of determining whether the statutory minimum sentence of 10 years should apply. The provision recognises, however, that the stage at which the accused indicates his or her intention to plead guilty and the circumstances surrounding that plea may be relevant.

3.176 Subsection (5)(a)(i)³⁰⁸ refers to the stage at which the accused indicates his or her intention to plead guilty. An early plea will merit more credit than a late plea.³⁰⁹ Subsection (5)(a)(ii) refers to the circumstances surrounding the plea. An accused person who voluntarily pleads guilty will be given more credit than an accused person who pleads guilty having been caught red-handed.³¹⁰ Presumably, as observed by the Court of Criminal Appeal in relation to the *Misuse of Drugs Act 1977*, the courts should be slow to treat a guilty plea, in and of itself, as an exceptional and specific circumstance.

3.177 In any case, a guilty plea will usually be considered in addition to other mitigating factors. In particular, there may be an overlap between the guilty plea and material assistance. In *People (DPP) v Barry*,³¹¹ for instance, Finnegan J observed:

“Firstly there was a plea of guilty. It has been suggested on behalf of the applicant that the plea of guilty should count for very little in this case as the respondent was caught red-handed. However he did immediately acknowledge his guilt. It has to be accepted also that there were possible defences available to him which could conceivably have succeeded. They were not without hope. By his plea of guilty he enabled the court proceedings to be prosecuted promptly and efficiently with a minimum impact on court time or time in investigation or constructing the case against him. He does merit some consideration therefore for his plea of guilty notwithstanding that it could be said that he was caught red handed. Having had regard to that one then moves on and takes into account the fact that the plea of guilty was instant and was maintained throughout his interviews with the Gardaí. It has to be accepted that he materially assisted in the investigation of the offence and that is a matter which also must be taken into account.”

(II) *Material Assistance*

3.178 Subsection (5)(b)³¹² of each provision provides that material assistance may also be considered an exceptional and specific circumstance for the purpose of determining whether the statutory minimum sentence should apply.

3.179 Presumably, as observed by the Court of Criminal Appeal in relation to the *Misuse of Drugs Act 1977*, material assistance may be in the form of an admission³¹³ or the provision of information. As noted

³⁰⁷ Subsection (10)(a) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

³⁰⁸ Subsection (10)(a)(i) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

³⁰⁹ *People (DPP) v Barry* Court of Criminal Appeal 23 June 2008; and *People (DPP) v Curtin* Court of Criminal Appeal 21 June 2010.

³¹⁰ *People (DPP) v Clail* Court of Criminal Appeal 9 February 2009; *People (DPP) v Dwyer* Court of Criminal Appeal 9 February 2009; and *People (DPP) v Walsh* Court of Criminal Appeal 17 December 2009.

³¹¹ Court of Criminal Appeal 23 June 2008.

³¹² Subsection (10)(b) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

³¹³ In *People (DPP) v Curtin* Court of Criminal Appeal 21 June 2010, for instance, the Court of Criminal Appeal referred to the fact that the accused had admitted that he had pressurised his two co-accuseds into taking part in the offence.

in paragraph 3.77, a voluntary admission or the voluntary provision of information merits more credit, as does an admission or information which facilitates the investigation or prosecution of the particular offence or other offences.

(III) Any Matters the Court considers Appropriate

3.180 Subsection (5)³¹⁴ also provides that the court may have regard to “any matters it considers appropriate”. As noted in paragraph 3.81, these include factors which mitigate the seriousness of the offence, in terms of culpability, harm and/or offender behaviour while committing the offence; and factors which mitigate the severity of the sentence.

(aa) Factors which Mitigate the Seriousness of the Offence

3.181 Factors which mitigate the seriousness of the offence include duress, the type of firearm used, the fact that the firearm was not discharged, and low level involvement.

Duress - Culpability

3.182 The fact that an offender was pressurised into committing a firearms offence may be considered an exceptional and specific circumstance. In *People (DPP) v Barry*,³¹⁵ for instance, Finnegan J observed:

“Subsection 4A also permits the court to take into account in sentencing exceptional and specific circumstances relating to the offence. In this case the explanation given by the respondent for his involvement in this offence was duress. He was threatened not just personally but his mother and his siblings, who were younger than him were threatened and that if he did not act as a courier in respect of this weapon that the consequences would be serious for him, his mother and particularly his young siblings. The Gardaí accepted this as did the learned trial judge. So this court must also take it into account.”³¹⁶

Type of Firearm - Offender Behaviour

3.183 The *Firearms Acts* do not distinguish between real and imitation firearms. In *People (DPP) v Clai*³¹⁷ Finnegan J observed that it makes little difference to the person who, in the course of a crime, is confronted with a weapon which, unbeknownst to him or her, is non-functioning. In *People (DPP) v Walsh*,³¹⁸ however, the Court of Criminal Appeal distinguished between shotguns and other firearms on the ground that shotguns came “towards the top end” of the “hierarchy of weapons.” It thus upheld the trial judge’s decision to impose the presumptive minimum sentence of five years.

Fact that Firearm not Discharged - Offender Behaviour/Harm

3.184 The fact that the accused did not discharge the weapon may be considered an exceptional and specific circumstance. In *People (DPP) v Fitzgerald*,³¹⁹ for instance, the trial judge observed that the defendant had had three opportunities to discharge his firearm but had resisted on each occasion. As a result, the trial judge concluded that it would be unjust to impose the minimum sentence.

Offender’s Level of Involvement - Offender Behaviour

3.185 It would appear that a low level of involvement in the commission of the offence may be considered an exceptional and specific circumstance. In *People (DPP) v Barry*,³²⁰ for instance, the Court of Criminal Appeal observed that the respondent was a courier who had no intention of using the weapon.

³¹⁴ Subsection (10) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

³¹⁵ Court of Criminal Appeal 23 June 2008.

³¹⁶ Similar observations were made in *People (DPP) v Purcell* Court of Criminal Appeal 21 June 2010.

³¹⁷ Court of Criminal Appeal 9 February 2009.

³¹⁸ Court of Criminal Appeal 17 December 2009.

³¹⁹ Court of Criminal Appeal 21 June 2010.

³²⁰ Court of Criminal Appeal 23 June 2008.

Similarly, in *People (DPP) v Purcell*³²¹ the trial judge had regard to the fact that the respondent had been put under pressure to mind the firearms for someone else.

(bb) Factors which Mitigate the Severity of the Sentence

3.186 Factors which mitigate the severity of the sentence include previous good character and, presumably, personal circumstances.

Previous Good Character

3.187 The fact that an offender was previously of good character may be considered an exceptional and specific circumstance.³²² Presumably, as observed by the Court of Criminal Appeal in relation to the *Misuse of Drugs Act 1977*, where an offender has minor previous convictions, which are not related to firearms offences, he or she may be treated as a first-time offender.³²³

Matters regarding the Offender's Personal Circumstances

3.188 Presumably, the matters regarding the offender's personal circumstances which would influence the court's decision regarding the imposition of the statutory minimum would be similar to those under the *Misuse of Drugs Act 1977*.³²⁴

3.189 To date, the courts have taken into account the youth of the offender; personal traumas suffered by the offender; family support; the naivety of the offender; and the possibility of rehabilitation. Thus in *People (DPP) v Kelly*³²⁵ Denham J outlined the exceptional and specific circumstances of the case as being:

"First, the Court has had special regard to the fact that the respondent was 17 years of age at the time when these series of offences took place. Secondly, at that time he had suffered severe trauma in his personal life and it had had an effect upon him. Thirdly, he has a very supportive family structure and this has been, and continues to be, of great assistance to him. Of special note, as the learned trial judge pointed out, was his mother's intervention which has been very helpful. Fourthly, the garda considered, and it is apparent, that he was a very naive young man at the time when the offences took place. Fifthly, he appears to be getting his alcohol and drug addiction under control."

3.190 Similarly, in *People (DPP) v Clai*³²⁶ Finnegan J referred to the particularly tragic personal circumstances of the respondent which included a dysfunctional family, sexual abuse and a history of self-harm.

(iii) Aggravating Factors

3.191 Subsection (6)³²⁷ of each provision provides that the court, when deciding whether or not to impose the statutory minimum sentence, may have regard to (i) any previous convictions for firearms' offences and (ii) the public interest in preventing firearms' offences. As noted in Chapter 1, previous convictions tend to aggravate the seriousness of an offence. Arguably, also, where the public interest lies in preventing firearms' offences this is an indication of how serious the offence should be considered.

³²¹ Court of Criminal Appeal 21 June 2010.

³²² *People (DPP) v Barry* Court of Criminal Appeal 23 June 2008.

³²³ See paragraph 3.97.

³²⁴ See paragraphs 3.100 to 3.107.

³²⁵ Court of Criminal Appeal 9 November 2009.

³²⁶ Court of Criminal Appeal 9 February 2009.

³²⁷ Subsection (11) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

(I) *Previous Convictions*

3.192 The courts will take a dim view of an offender who has shown himself or herself to be a repeat offender. Thus in *People (DPP) v Donovan*³²⁸ Finnegan J observed that the respondent had a “long sequence of convictions dating back to 2001”. He had been convicted of 46 offences and sentenced to 33 terms of imprisonment in respect of those offences. In imposing the presumptive minimum sentence of five years, Finnegan J concluded that society needed to be protected from a person who was a recidivist to the extent that the respondent was a recidivist.³²⁹

3.193 The existence of previous convictions for an offence under the *Firearms Acts 1925 to 2006*, the *Offences against the State Acts 1939 to 1998* or the *Criminal Justice (Terrorist Offences) Act 2005* may justify an upward departure from the statutory minimum. Subsection (3) and subsection (6)(a)³³⁰ of each provision provide that the court may have regard to such previous convictions when determining whether the statutory minimum should apply.

3.194 Thus in *People (DPP) v Dwyer*³³¹ Finnegan J had regard to the fact that the respondent had a previous conviction under the *Firearms Acts*, “although it must be said it is at the lower end of seriousness”, to increase the sentence from four to five years.

(II) *Public Interest*

3.195 Subsection (6)(b)³³² of each provision provides that the court may consider whether or not the public interest would be served by the imposition of a sentence of less than the presumptive minimum.

(III) *Other*

3.196 Factors including the nature of the firearm, the fact that it was brandished in a crowded place, and the fact that it was discharged have justified upward departures from the presumptive minimum sentence.³³³ The fact that the offender possessed more than one firearm³³⁴ and the fact that he possessed a firearm and drugs have also aggravated the minimum sentence.³³⁵ Arguably, these are all factors which aggravate the seriousness of an offence.

(c) *Early Release*

3.197 In a similar vein to section 27 of the *Misuse of Drugs Act 1977*, section 27C of the *Firearms Act 1964*, as amended,³³⁶ restricts the power to grant early release to those who have been convicted of an offence under the *Firearms Acts*.³³⁷ Specifically, section 27C(2) restricts the power to commute or remit punishment; section 27C(3) restricts the power to grant remission for good behaviour; and section 27C(4) restricts the power to grant temporary release. By contrast to the *Misuse of Drugs Act 1977*, however, section 27C does not permit the court to list a sentence for review.

³²⁸ Court of Criminal Appeal 28 June 2010.

³²⁹ Similar observations were made in *People (DPP) v Kelly* Court of Criminal Appeal 24 November 2008.

³³⁰ Subsection (8) and (11)(a) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

³³¹ Court of Criminal Appeal 9 February 2009.

³³² Subsection (10)(b) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

³³³ *People (DPP) v Fitzgerald* Court of Criminal Appeal 21 June 2010; and *People (DPP) v Curtin* Court of Criminal Appeal 21 June 2010.

³³⁴ *People (DPP) v Kelly* Court of Criminal Appeal 24 November 2008.

³³⁵ *People (DPP) v Purcell* Court of Criminal Appeal 21 June 2010.

³³⁶ As inserted by section 61 of the *Criminal Justice Act 2006*.

³³⁷ Section 27C(1) provides that section 27C applies to section 15 of the *Firearms Act 1925* sections 26 to 27B of the *Firearms Act 1964* and section 12A of the *Firearms and Offensive Weapons Act 1990*.

(3) Discussion

3.198 The Commission notes that there has been little in the way of commentary in the literature on the presumptive sentencing provisions in the *Firearms Acts*, as amended. This may reflect that these provisions, which were modelled on those in the *Misuse of Drugs Acts*, are relatively recent in origin and that there is therefore less outcomes on which to comment. It could of course be argued, by analogy, that the criticisms relating to the presumptive sentencing system under the *Misuse of Drugs Act 1977* could be applied to the presumptive sentencing system under the *Firearms Acts*.

3.199 Campbell does note, however, that the problem of gun crime is a complex one which may require a more sophisticated response than presumptive sentencing:

“The imposition of presumptive sentences as a means of deterring gun crime is premised on an unduly simplistic conception of the actor. Qualitative studies of gun criminals indicate that the decision to commit the act is rarely driven by ‘rational’ considerations per se and so much research challenges the deterrent value of robust sentences...

[T]he individual’s decision to commit crime in a broad sense may not be influenced by rational factors, but his choice as to where and when to commit the act may indeed be governed by such reasoning. Drawing on this, it may be contended that the perpetrator of gun crime thinks rationally in the context of the act itself, such as regarding the choice of weapon, the time of day, the location and the number of people involved, but that his ultimate involvement in gun crime must be interrogated using more than the rational actor paradigm.”³³⁸

3.200 Specifically, Campbell notes that the expression of masculinity and social deprivation may be contributing factors of which policy makers should be cognisant. Such factors may require an educational and psychological rather than legal approach.³³⁹

D Comparative Analysis

(1) Northern Ireland

3.201 In addition to the mandatory life sentence for murder, there are mandatory sentences for certain firearms offences and public protection but not, apparently, for drugs offences.

(a) Drug Offences

3.202 The *Misuse of Drugs Act 1971*³⁴⁰ applies to Northern Ireland.³⁴¹ Section 25 of the *Misuse of Drugs Act 1971* provides that the punishments applicable to offences under the Act are set out in Schedule 4. Section 25(2) clarifies, however, that the periods and sums of money referred to in Schedule 4 are maximum terms of imprisonment and maximum fines. It would thus appear that drug offences in Northern Ireland do not attract mandatory minimum penalties.

(b) Firearms Offences

3.203 In Northern Ireland the use of firearms is regulated by the *Firearms (Northern Ireland) Order 2004*, as amended.³⁴² The stated purpose of the order is to provide a legislative framework for the control of firearms which is effective and proportionate and strikes a balance between public safety and the reasonable expectations of legitimate shooting enthusiasts.³⁴³

³³⁸ Campbell “Responding to Gun Crime in Ireland” (2010) 50 *Brit J Criminology* 414 at 422.

³³⁹ Campbell “Responding to Gun Crime in Ireland” (2010) 50 *Brit J Criminology* 414 at 429.

³⁴⁰ In England and Wales the *Misuse of Drugs Act 1971* has been amended by the *Crime (Sentences) Act 1997* and the *Powers of Criminal Courts 2000* but it would appear that these amendments do not apply to Northern Ireland.

³⁴¹ *Criminal Justice Act 2003* does not apply in this regard.

³⁴² *Firearms (Amendment) (Northern Ireland) Order 2004* and *Violent Crime Reduction Act 2006*.

³⁴³ Explanatory Memorandum to the *Firearms (Northern Ireland) Order 2004*.

3.204 The *Firearms (Northern Ireland) Order 2004* was prepared following the publication of a review conducted by the Northern Ireland Office.³⁴⁴ The Review was inspired by the *Criminal Justice Act 2003*, which made a number of changes to the sentencing framework in England and Wales, and, to a lesser extent, by the 2000 *Review of the Criminal Justice System in Northern Ireland*.³⁴⁵ The Review examined Northern Ireland's firearms legislation, the *Firearms (Northern Ireland) Order 1981*, and recommendations contained in the Cullen Inquiry into the 1996 Dunblane Massacre.³⁴⁶ A Proposal for a *Draft Firearms Order* was laid before Parliament on 22nd July 2002 and, following consultation with and approval of the Northern Ireland Affairs Committee,³⁴⁷ was adopted as the *Firearms (Northern Ireland) Order 2004*.

3.205 The *Firearms (Northern Ireland) Order 2004* re-enacted much of the *Firearms (Northern Ireland) Order 1981* and introduced a number of new provisions for the purpose of improving public safety.³⁴⁸ One such provision was Article 70 which introduced a mandatory sentencing regime in respect of certain firearms offences. Article 70 stipulates that the courts impose a sentence of five years on offenders aged 21 years or over and a sentence of three years on offenders aged below 21 years, unless there are "exceptional circumstances relating to the offence or to the offender which justify its not doing so".³⁴⁹

3.206 The offences to which the mandatory sentencing regime applies are the possession, purchase or acquisition of a handgun without holding a firearm certificate or otherwise than as authorised by a firearm certificate;³⁵⁰ the possession, purchase, acquisition, manufacture, sale or transfer of certain controlled firearms or ammunition;³⁵¹ the possession of a firearm or ammunition with intent to endanger life or cause serious damage to property or to enable another person to do so;³⁵² the use of a firearm or imitation firearm to resist arrest;³⁵³ the carrying of a firearm with intent to commit an indictable offence or to resist arrest or to prevent the arrest of another;³⁵⁴ the carrying or discharge of a firearm in a public place,³⁵⁵ and trespass in a building with a firearm or imitation firearm.³⁵⁶

(c) Public Protection

3.207 Article 13 of the *Criminal Justice (Northern Ireland) Order 2008* provides that the court must impose a life sentence for a serious offence where the court is of the opinion that there is a significant risk to members of the public of serious harm occasioned by the commission by the offender of further specified offences. If the offence is one in respect of which the offender would, apart from Article 13, be liable to a life sentence and the court is of the opinion that the seriousness of the offence is such as to justify the imposition of a life sentence, the court must impose a life sentence. Where an offence is serious but does not attract a life sentence or the current offence is not sufficiently serious, the court must impose an indeterminate custodial sentence and specify a period of at least two years as the minimum

³⁴⁴ *Review of the Sentencing Framework in Northern Ireland* (Northern Ireland Office, 2004).

³⁴⁵ *Review of the Sentencing Framework in Northern Ireland* (Northern Ireland Office, 2004) at 1-2.

³⁴⁶ *Public Inquiry into the Shootings at Dunblane Primary School on 13 March 1996* Cm 3386 (1996)

³⁴⁷ *Report of the Northern Ireland Affairs Committee 2004*.

³⁴⁸ Explanatory Memorandum to the *Firearms (Northern Ireland) Order 2004*.

³⁴⁹ Article 70(2).

³⁵⁰ Article 3(1)(a) of the *Firearms (Northern Ireland) Order 2004*.

³⁵¹ Section 45(1)(a), section 45(1)(aa), section 45(1)(b), section 45(1)(c), section 45(1)(d), section 45(1)(e), section 45(1)(g) and section 45(2)(a) of the *Firearms (Northern Ireland) Order 2004*.

³⁵² Section 58 of the *Firearms (Northern Ireland) Order 2004*.

³⁵³ Section 59 of the *Firearms (Northern Ireland) Order 2004*.

³⁵⁴ Section 60 of the *Firearms (Northern Ireland) Order 2004*.

³⁵⁵ Section 61(1) of the *Firearms (Northern Ireland) Order 2004*.

³⁵⁶ Section 62(1) of the *Firearms (Northern Ireland) Order 2004*.

period required to satisfy the requirements of retribution and deterrence. A sentence under Article 13 is not amenable to remission under the Prison Rules.

3.208 The fact that Article 13 bears a remarkable resemblance to section 225 of the *Criminal Justice Act 2003*, which is discussed at paragraph 3.227, may be explained by reference to the findings of the 2000 *Review of the Sentencing Framework in Northern Ireland*. The Review referred to the fact that section 225 of the *Criminal Justice Act 2003* had introduced extended and indeterminate public protection sentences for offenders convicted of specified sexual or violent offences and assessed by the court as dangerous.³⁵⁷ It observed, however, that the 2003 Act did not apply to Northern Ireland and that there remained, as a result, a gap in Northern Ireland legislation in respect of such offenders:

“The Review identified a gap in provision in Northern Ireland for the management of dangerous, violent and sexual offenders who continue to pose a risk to the public at their automatic release date. Under existing provision it is only where offenders have been given a mandatory or discretionary life sentence that assessment of the risk they pose to the public enables their continued detention in custody. Consultation respondents considered this an important public protection issue which needed to be addressed. Therefore we now introduce indeterminate and extended custodial sentences in Northern Ireland.”³⁵⁸

A draft *Criminal Justice (Northern Ireland) Order 2007* was proposed and later adopted as the *Criminal Justice (Northern Ireland) Order 2008*.³⁵⁹

(2) England and Wales

3.209 It has been observed that mandatory sentencing in the UK reflects the attention paid to recidivist offenders in the 1990s, which resulted in “three-strikes” statutes in the United States.³⁶⁰ In addition to the mandatory life sentence for murder, there are mandatory sentences for certain repeat drug offences, certain firearms offences, repeat domestic burglaries and offences which necessitate public protection. Each will be considered in turn.

(a) Drug Offences

3.210 Section 110 of the *Powers of Criminal Courts (Sentencing) Act 2000* obliges the courts to impose a minimum sentence of 7 years where the offender has been convicted of a third Class A drug trafficking offence.³⁶¹ The courts may impose a sentence of less than 7 years where there are “specific circumstances” relating to the offences or the offender, which would make the minimum sentence “unjust in all the circumstances.” While the 2000 Act does not define what is meant by “specific circumstances”, it obliges the courts, when they find that such circumstances exist, to state in open court what those circumstances are.³⁶²

3.211 In addition, section 152 of the 2000 Act permits the courts to impose a sentence of not less than 80 percent of the minimum term where the defendant has indicated an intention to plead guilty.³⁶³ The courts must take into account the stage at which the defendant indicated his or her intention to plead guilty and the circumstances surrounding that indication. It has been submitted that a court is entitled to

³⁵⁷ *Proposed Draft Criminal Justice (Northern Ireland) Order 2007 - Equality Screening Forms* (Northern Ireland Office, 2007) at 7.

³⁵⁸ *Proposed Draft Criminal Justice (Northern Ireland) Order 2007 - Equality Screening Forms* (Northern Ireland Office, 2007) at 8.

³⁵⁹ Section 225 of the *Criminal Justice Act 2003* has since been amended by the *Criminal Justice and Immigration Act 2008*. It is unclear whether similar amendments have been made in Northern Ireland.

³⁶⁰ *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* (Department of Justice, Canada) at 14.

³⁶¹ Class A drugs are defined in Part 1 of Schedule 2 of the *Misuse of Drugs Act 1971*. The term “drug trafficking offence” is defined by section 1 of the *Drug Trafficking Act 1994*.

³⁶² Section 110 of the *Powers of Criminal Courts (Sentencing) Act 2000* replaces section 3 of the *Crime (Sentences) Act 1997* which contained an identical provision.

³⁶³ See also section 144 of the *Criminal Justice Act 2003*.

take advantage of section 152 whenever an offender has pleaded guilty, even though the intention to plead guilty has not been indicated in advance of the trial.³⁶⁴ Where a court imposes a sentence of less than 7 years, it should indicate how it arrived at the sentence and what allowance has been made for the plea.³⁶⁵

3.212 Section 4A of the *Misuse of Drugs Act 1971*³⁶⁶ provides that the court should consider it an aggravating factor where the drug supply has taken place within the vicinity of a school or where couriers under 18 years of age have been used.

3.213 The *Powers of Criminal Courts (Sentencing) Act 2000* replaced the *Crime (Sentences) Act 1997* but, as it was a consolidation act,³⁶⁷ made no changes to the substantive law.³⁶⁸ A principal feature of the 1997 Act was the introduction of presumptive minimum sentences for certain offences including third class A drug trafficking offences.³⁶⁹ This was just one of the proposals contained in the Government's 1996 White Paper on Crime³⁷⁰ which were implemented by the 1997 Act. In the White Paper the Government had indicated that it would be taking a punitive approach to tackling crime³⁷¹ and emphasised its view that prison worked³⁷² and that it was necessary to impose "severe deterrent sentences" on persistent dealers in hard drugs.³⁷³ It thus recommended that the courts be required in future to impose a minimum sentence of 7 years on those convicted of a third Class A drug trafficking offence.³⁷⁴

3.214 The *Crime (Sentences) Act 1997* had been preceded by the *Criminal Justice Act 1991*, which had sought to implement the proposals contained in the Government's 1990 White Paper on Crime.³⁷⁵ A broad aim of the 1991 Act had been to promote the principle of proportionality and, through this, achieve greater consistency in sentencing.³⁷⁶ Ashworth notes that while this objective was set out clearly in the

³⁶⁴ *Current Law Statutes* (Sweet and Maxwell, 2000) at 6-105.

³⁶⁵ Brown [2000] Crim L R 496.

³⁶⁶ Inserted by section 1 of the *Drugs Act 2005*.

³⁶⁷ The *Powers of Criminal Courts (Sentencing) Act 2000* was enacted pursuant to the recommendations of the Law Commission and the Scottish Law Commission contained in the 2000 *Report on the Consolidation of Legislation relating to Sentencing* Cm 4626 SE/2000/15.

³⁶⁸ *Current Law Statutes* (Sweet and Maxwell, 2000) at 6-7.

³⁶⁹ Section 2 introduced a presumptive life sentence for a second serious offence; section 3 introduced a presumptive seven-year sentence for a third Class A drug trafficking offence; and section 4 introduced a presumptive three-year sentence for a third domestic burglary.

³⁷⁰ *Protecting the Public - The Government's Strategy on Crime in England and Wales*, March 1996.

³⁷¹ *White Paper on Protecting the Public - The Government's Strategy on Crime in England and Wales*, March 1996, at 3.

³⁷² *White Paper on Protecting the Public - The Government's Strategy on Crime in England and Wales*, March 1996, at 4.

³⁷³ *White Paper on Protecting the Public - The Government's Strategy on Crime in England and Wales*, March 1996, at 23.

³⁷⁴ *White Paper on Protecting the Public - The Government's Strategy on Crime in England and Wales*, March 1996, at 49.

³⁷⁵ *White Paper on Crime, Justice and Protecting the Public* Cm 965 (HMSO, 1990).

³⁷⁶ Ashworth and Player "Criminal Justice Act 2003: The Sentencing Provisions" 68 Mod L Rev 822 at 822; Fitzgerald "Californication of Irish Sentencing Law" (2008) 18 ICLJ 42 at 42; and Bacik "Crime and Punishment - Retribution or Rehabilitation" (2001) <http://www.lawlibrary.ie/viewdoc.asp?Docid=144&Catid=18&StartDate=01+January+2001> (last accessed on 22.06.11).

1990 White Paper, the provisions of the 1991 Act were less clear.³⁷⁷ Within months of its introduction, parts of the 1991 Act had been dismantled and over the years, its provisions having been rarely cited in judgments, faded into the background.

3.215 In 1993 there was a dramatic change in the penal climate following the murder of James Bulger.³⁷⁸ In 1996 the Government published its White Paper on Crime³⁷⁹ in which it (i) indicated that it would be taking a punitive approach to tackling crime;³⁸⁰ (ii) expressed the view that prison worked;³⁸¹ and (iii) sought to introduce mandatory sentencing in respect of a number of offences. The fact that this was a significant departure from the prevailing penal philosophy was illustrated by the fact that the same Government had in 1990 stated that prison was just “an expensive way of making bad people worse”.³⁸² The 1996 White Paper was criticised as reflecting the “increasing managerialism and politicisation of sentencing policy”.³⁸³

3.216 The *Crime (Sentences) Bill 1996* was introduced in the dying months of the Conservative Parliament.³⁸⁴ The Bill was severely criticised by the House of Lords on the ground that its provisions were unwarranted and unjustified.³⁸⁵ Thomas notes, for instance, the view of the late Lord Taylor of Gosforth that “never in the history of our criminal law have such far-reaching proposals been put forward on the strength of such flimsy evidence”.³⁸⁶ In March 1996 a General Election was announced. On the one hand, this eased the passage of the 1996 Bill through Parliament by putting the UK Government under pressure to complete or abandon any bills that were before it while, at the same time, the Opposition did not want to be seen as “soft on crime” in the run up to an election. On the other hand, it gave the House of Lords leverage to force the outgoing Government to accept certain amendments.³⁸⁷ As a result, the Home Secretary agreed to retain a House of Lords’ amendment, which gave the sentencing court a discretion not to impose the mandatory minimum sentence on domestic burglars and Class A drug traffickers in specified circumstances,³⁸⁸ in return for the Opposition’s agreement to support 17 Government Bills.

3.217 The *Crime (Sentences) Act 1997* received the Royal Assent on 21st March 1997, the day the Conservative Parliament was prorogued prior to the General Election on 1st May.³⁸⁹ Its enactment was to mark an evolutionary step in sentencing both in terms of its practical and its symbolic effects. Its practical effects comprised of a two-strikes rule in relation to offenders who had been convicted of a second serious offence³⁹⁰ and a three-strikes rule in relation to offenders who had been convicted of a third Class

³⁷⁷ Ashworth and Player “Criminal Justice Act 2003: The Sentencing Provisions” 68 Mod L Rev 822, at 822.

³⁷⁸ Ashworth and Player “Criminal Justice Act 2003: The Sentencing Provisions” 68 Mod L Rev 822, at 822.

³⁷⁹ *White Paper on Protecting the Public - The Government’s Strategy on Crime in England and Wales*, March 1996.

³⁸⁰ *White Paper on Protecting the Public - The Government’s Strategy on Crime in England and Wales*, March 1996, at 3.

³⁸¹ *White Paper on Protecting the Public - The Government’s Strategy on Crime in England and Wales*, March 1996, at 4.

³⁸² Ashworth and Player “Criminal Justice Act 2003: The Sentencing Provisions” 68 Mod L Rev 822 at 822.

³⁸³ Henham “Back to the Future on Sentencing: The 1996 White Paper” (1996) 59 Mod L Rev 861 at 861.

³⁸⁴ Fitzgerald “Californication of Irish Sentencing Law” (2008) 18 ICLJ 42 at 42.

³⁸⁵ Fitzgerald “Californication of Irish Sentencing Law” (2008) 18 ICLJ 42 at 42; Thomas “The Crime (Sentences) Act 1997” [1998] Crim LR 83 at 83; and Thomas *Current Law Statutes* (Sweet and Maxwell, 1997) at 43-3.

³⁸⁶ *Current Law Statutes* (Sweet and Maxwell, 1997) at 43-3.

³⁸⁷ Fitzgerald “Californication of Irish Sentencing Law” (2008) 18 ICLJ 42 at 42.

³⁸⁸ Henham “Making Sense of the Crime (Sentences) Act 1997” (1998) 61 Mod L Rev 223 at 223.

³⁸⁹ Henham “Making Sense of the Crime (Sentences) Act 1997” (1998) 61 Mod L Rev 223 at 223.

³⁹⁰ Section 2 of the *Crime (Sentences) Act 1997*.

A drug trafficking offence³⁹¹ or domestic burglary.³⁹² Thomas asserts, however, that the importance of the 1997 Act was in what it symbolised:

“The decision to implement the Act suggests that the Home Secretary has little regard for the opinions and experience of the senior judiciary, and is more interested in the political than the practical consequences of the legislation. The introduction of mandatory minimum sentences (absent from the English sentencing system since 1891) for offenders convicted for a third time of a class A drug dealing offence establishes a *precedent for the introduction of mandatory minimum sentences* for just about any kind of crime. A Home Secretary who has brought these provisions into force will find it difficult to resist the pressure for mandatory sentences in other contexts.”³⁹³ [Emphasis added]

(b) Firearms Offences

3.218 Section 51A³⁹⁴ of the *Firearms Act 1968*, as amended,³⁹⁵ provides for a presumptive minimum sentence of five years³⁹⁶ or three years³⁹⁷ in respect of certain firearms offences. These offences are possession,³⁹⁸ purchase, acquisition, manufacture, sale or transfer of a firearm;³⁹⁹ using another person to mind a dangerous prohibited weapon;⁴⁰⁰ possession of a firearm with intent to injure;⁴⁰¹ possession of a firearm with intent to cause fear of violence;⁴⁰² use of a firearm to resist arrest;⁴⁰³ carrying a firearm with criminal intent;⁴⁰⁴ carrying a firearm in a public place;⁴⁰⁵ and trespassing in a building with a firearm.⁴⁰⁶ The minimum term must be imposed unless there are exceptional circumstances which would justify the

³⁹¹ Section 3 of the *Crime (Sentences) Act 1997*.

³⁹² Section 4 of the *Crime (Sentences) Act 1997*.

³⁹³ Thomas “The Crime (Sentences) Act 1997” [1988] Crim LR 83 at 83.

³⁹⁴ Inserted by section 287 of the *Criminal Justice Act (UK) 2003*.

³⁹⁵ Section 30 of the *Violent Crime Reduction Act 2006*.

³⁹⁶ Section 51A(5) provides that a sentence of five years must be imposed in England and Wales where the offender is aged 18 years or over at the time of the offence and in Scotland where the offender is aged 21 years or over at the time of the offence.

³⁹⁷ Section 51A(5) provides that a sentence of three years must be imposed in England and Wales where the offender is aged under 18 years at the time of the offence and in Scotland where the offender is aged under 21 years at the time of the offence.

³⁹⁸ The imposition of a mandatory sentence to a possession offence has given rise to a number of seemingly unjust results: “Grandmother jailed for WWII ‘Family Heirloom’ Pistol” BBC 16 June 2010 available at www.bbc.co.uk/news/10335003; “Pensioner jailed for Hoarding ‘Aladdin’s Cave’ of Firearms” The Telegraph 30 December 2009; and O’Neill “Why Judges find Ways to ignore the Law in Gun Crime Sentences” The Times 25 March 2008.

³⁹⁹ Section 5(1) and section 5(1A) of the *Firearms Act 1968*.

⁴⁰⁰ Section 29 *Violent Crime Reduction Act 2006*.

⁴⁰¹ Section 16 of the *Firearms Act 1968*.

⁴⁰² Section 16A of the *Firearms Act 1968*.

⁴⁰³ Section 17 of the *Firearms Act 1968*.

⁴⁰⁴ Section 18 of the *Firearms Act 1968*.

⁴⁰⁵ Section 19 of the *Firearms Act 1968*.

⁴⁰⁶ Section 20(1) of the *Firearms Act 1968*.

court not doing so.⁴⁰⁷ It would appear that a guilty plea will not result in a reduction of the sentence imposed for an offence under section 51A.⁴⁰⁸

3.219 Section 51A of the *Firearms Act 1968* was inserted by section 287 of the *Criminal Justice Act 2003*. It has been noted⁴⁰⁹ that the *Criminal Justice Act 2003* was inspired by proposals contained in the Government's 2002 White Paper *Justice for All*¹⁰ which had, in turn, incorporated many of the recommendations contained in the 2001 *Halliday Report*.⁴¹¹ While neither the 2002 White Paper nor the 2001 *Halliday Report* referred to mandatory sentencing or firearms offences, there was a sense that a public appetite for a stricter approach to sentencing existed.⁴¹²

3.220 During a House of Commons debate in late 2002,⁴¹³ the then Home Secretary was asked whether he was aware of the London Metropolitan police's aim to get the minimum sentence for carrying a weapon raised to five years. He responded that he was aware of representations having been made and commented that "[t]here is good reason for treating the issue seriously and considering whether we should add it to the Criminal Justice and Sentencing Bill."⁴¹⁴ He was later to rely on this statement as having been an indication of his intention to introduce minimum sentences for gun crime from December 2002.⁴¹⁵

3.221 In the UK, however, firearms legislation has, for the most part, resulted from reactionary responses to tragic events. In a 2006 Home Office Report, for instance, it was noted that:

"Since the mid-1980s, a number of significant changes have occurred to the legislative and public policy responses to gun crime and firearms more generally. Automatic weapons having been banned by the Firearms Act 1937, semi-automatic rifles were banned by the Firearms (Amendment) Act 1988 after the massacre of 16 people in Hungerford in 1987. Then a ban on handguns was introduced by the Firearms (Amendment) Act 1997. This followed the Cullen Inquiry ... into the 1996 school massacre in Dunblane, Scotland, in which 16 children and a

⁴⁰⁷ It has been noted that this ground for not imposing the presumptive minimum term has been taken from section 109 of the *Powers of Criminal Courts (Sentencing) Act 2000*, which imposes an automatic life sentence for a second serious offence, rather than section 110 or section 111 of the 2000 Act, which impose a three-year term for a third Class A drug trafficking offence or domestic burglary and allows the court not to impose the minimum term if it would be unjust to do so in all the circumstances. Arguably, exceptional circumstances which justify the court to not impose the minimum sentence is a lower threshold than exceptional circumstances which would make the minimum term unjust in all the circumstances: Current Law Statutes (Sweet and Maxwell, 2003) at 44-262.

⁴⁰⁸ Richardson (ed) *Arbald 2010* (Sweet and Maxwell, 2010) at 5-261.

⁴⁰⁹ *Criminal Justice Act 2003 - Explanatory Notes* at paragraph 3; and *Towards Effective Sentencing - Fifth Report of Session 2007-2008, Volume I* (House of Commons Justice Committee, 2008) at page 7.

⁴¹⁰ *Justice for All* Cm 5563 (Home Office, 2002).

⁴¹¹ *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001).

⁴¹² *Justice for All* (Home Office, Cm 5563, 2002) at paragraph 5.2.

⁴¹³ House of Commons Debates, Monday, 2 December 2002, Column 594. Available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/vo021202/debtext/21202-01.htm> (last accessed on 23.06.11).

⁴¹⁴ House of Commons Debates, Monday, 2 December 2002, Column 594. Available at <http://www.parliament.the-stationery-office.co.uk/pa/cm200203/cmhansrd/vo021202/debtext/21202-01.htm> (last accessed on 23.06.11). Even before the provisions regarding mandatory minimum sentences were inserted, the Criminal Justice Bill had been widely criticised by civil liberties' groups. See Tempest "Blunkett's Bill under Fire" *The Guardian* 21 November 2002.

⁴¹⁵ Sparrow "Blunkett outlaws Use of Fake Guns" *The Telegraph* 6 January 2003; Vasagar and Ward "Five-Year Jail Terms planned as Rise in Use of Illegal Weapons revealed" *The Guardian* 6 January 2003; and "Blunkett confirms tough new Gun Penalties" *The Guardian* 6 January 2003.

teacher were shot and killed. Both the Hungerford and Dunblane massacres were committed by lone gunmen with legally owned firearms. The UK now has some of the most restrictive firearm laws in Europe ...⁴¹⁶

3.222 The same might be said of section 287 of the *Criminal Justice Act 2003*. In January 2003, two teenage girls, Charlene Ellis and Latisha Shakespear, were shot dead as they stood outside a New Year's party in Aston, Birmingham.⁴¹⁷ The incident was considered to be indicative of a rising gun culture in England and Wales.⁴¹⁸ Indeed, this was confirmed by Home Office figures released shortly afterward, which showed that there had been a 35 percent increase in gun crime in England and Wales during the 12 months up to April 2002.⁴¹⁹ In advance of these figures being released the Home Secretary confirmed that he would be introducing a mandatory minimum five-year sentence for illegal possession and use of firearms.⁴²⁰ The announcement met with widespread criticism from the judiciary, who argued that they should be allowed to use their discretion in sentencing offenders, and opposition parties, who argued that the Home Secretary was engaging in "knee-jerk" politics.⁴²¹ Within a day of his initial announcement, the Home Secretary announced that the proposed legislation would be modified to permit the judiciary to depart from the minimum sentence where there were exceptional circumstances.⁴²²

(c) Domestic Burglary

3.223 Section 111⁴²³ of the *Powers of Criminal Courts (Sentencing) Act 2000* provides that where a person who is convicted of a third domestic burglary the court must impose a minimum sentence of three years, except where there are particular circumstances which relate to the offences or the offender which would make it unjust to do so in all the circumstances.

3.224 Section 111 of the 2000 Act replaced section 4 of the *Crime (Sentences) Act 1997*. As noted at paragraphs 3.214 to 3.217, the *Crime (Sentences) Act 1997* sought to implement the proposals contained in the Government's 1996 White Paper.⁴²⁴ One of those proposals concerned the imposition of a mandatory minimum sentence of three years on offenders convicted of a third domestic burglary.⁴²⁵ In the White Paper, the Government observed that burglary, which was a "pernicious and predatory" crime which could have particularly disastrous effects for elderly people, was one of the most commonly

⁴¹⁶ Hales, Lewis and Silverstone *Gun Crime: The Market in and Use of illegal Firearms Research Study* 298 (Home Office, 2006) at 7.

⁴¹⁷ Oliver "Birmingham Shooting Victims Named" *The Guardian* 3 January 2003.

⁴¹⁸ Burke, Thompson, Bright, Hinsliff, Barnett and Rowan "Where the Gun rules and the Innocent go in Fear" *The Guardian* 5 January 2003.

⁴¹⁹ Allen and Barrett "Huge Increase in Gun Use as Crime Figures Soar" *The Independent* 9 January 2003; Burrell "Tories attack 'truly terrible' Rise in Gun Crime" *The Independent*, 10 January 2003; and Vasagar and Ward "Five-Year Jail Terms planned as Rise in Use of Illegal Weapons revealed" *The Guardian* 6 January 2003.

⁴²⁰ Vasagar and Ward "Five-Year Jail Terms planned as Rise in Use of Illegal Weapons revealed" *The Guardian* 6 January 2003; Sparrow "Blunkett outlaws Use of Fake Guns" *The Telegraph* 6 January 2003; "Blunkett confirms tough new Gun Penalties" *The Guardian* 6 January 2003.

⁴²¹ "No 10 backs down on Gun Crime Sentencing" *The Telegraph* 7 January 2003; and Gibb and Ford "Judges Force Retreat on Sentences" *The Guardian* 7 January 2003.

⁴²² "No 10 backs down on Gun Crime Sentencing" *The Telegraph* 7 January 2003; Johnston "Blunkett's New Five-Year Minimum Jail Term 'Knee-Jerk Politics'" *The Telegraph* 7 January 2003; and Gibb and Ford "Judges Force Retreat on Sentences" *The Guardian* 7 January 2003.

⁴²³ Replaced section 4 of the *Crime (Sentences) Act 1997*.

⁴²⁴ *Protecting the Public - The Government's Strategy on Crime in England and Wales* Cm 3190 (Home Office, 1996).

⁴²⁵ *Protecting the Public - The Government's Strategy on Crime in England and Wales* Cm 3190 (Home Office, 1996) at page 51.

occurring offences.⁴²⁶ It noted, however, that in a substantial portion of cases the courts did not impose a custodial sentence:

“Severe penalties are available for burglary. The maximum sentence is 14 years for burglary of a dwelling, and 10 years in other cases. In cases of aggravated burglary - where the offender has a weapon - the maximum penalty is life imprisonment. But in a substantial proportion of cases, the courts do not impose a custodial sentence on convicted burglars even if they have numerous previous convictions... The average sentence length imposed on a sample of offenders convicted for the first time of domestic burglary in 1993 and 1994 and given a custodial sentence was only 16.2 months in the Crown Court and 3.7 months in magistrates’ courts. Even after 3 or more convictions, the average sentence imposed on conviction in the Crown Court was only 18.9 months; and after 7 or more convictions, 19.4 months. And 28% of offenders convicted in the Crown Court with 7 or more convictions for domestic burglary were not sent to prison at all. At magistrates’ courts, 61% of offenders with 7 or more domestic burglary convictions were given a non-custodial sentence in 1993 and 1994.”⁴²⁷

3.225 It is debatable as to whether section 4 of the *Crime (Sentences) Act 1997* or, indeed, section 110 of the *Powers of Criminal Courts Act 2000*, adequately addressed this perceived problem. In 2009, for instance, sentencing statistics showed that in 2007 79 percent of offenders convicted of a third domestic burglary had not received the three-year presumptive minimum.⁴²⁸

(d) Public Protection

3.226 Section 225 of the *Criminal Justice Act 2003* provides that the courts must impose a life sentence for a serious offence⁴²⁹ where they are of the opinion that there is a significant risk that the offender will commit further offences causing serious harm to members of the public. If the offence is one in respect of which the offender would, apart from section 225, be liable to imprisonment for life, and the court considers that the seriousness of the offence, or the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of imprisonment for life, the court must impose a sentence of imprisonment for life. Where an offence is serious but does not attract a life sentence or the current offence is not sufficiently serious, the court must impose a sentence of imprisonment for public protection. Section 226 creates a similar sentence for offenders under 18 years of age.

3.227 As noted at paragraph 3.219, the *Criminal Justice Act 2003* was inspired by proposals contained in the Government’s 2002 White Paper *Justice for All*⁴³⁰ which had, in turn, incorporated many of the recommendations contained in the 2001 *Halliday Report*.⁴³¹ In the *Halliday Report* it was observed that the public were frustrated by a criminal justice system which it perceived to be treating “dangerous, violent, sexual and other serious offenders” leniently.⁴³² Previously, section 109 of the *Powers of Criminal Courts (Sentencing) Act 2000* had provided for a mandatory life sentence where the offender had been convicted of a second serious offence.⁴³³ This replaced section 2 of the *Crimes (Sentences) Act 1997*, a provision which had been severely criticised during its life.⁴³⁴ In 2000, the Court of Appeal effectively

⁴²⁶ *Protecting the Public - The Government’s Strategy on Crime in England and Wales* Cm 3190 (Home Office, 1996) at page 51.

⁴²⁷ *Protecting the Public - The Government’s Strategy on Crime in England and Wales* Cm 3190 (Home Office, 1996) at page 51-52.

⁴²⁸ Hope “Four-Fifths of Repeat Burglars do not receive Minimum Jail Term, say Tories” *The Telegraph*, 4 February 2009.

⁴²⁹ The term “serious offence” is defined by section 224(2) of the *Criminal Justice Act (UK) 2003*.

⁴³⁰ *Justice for All* Cm 5563 (Home Office, 2002).

⁴³¹ *Making Punishments Work: Report of a Review of the Sentencing Framework for England and Wales* (Home Office, 2001).

⁴³² *Justice for All* (Home Office, Cm 5563, 2002) at paragraph 5.2.

⁴³³ This provision replaced section 2 of the *Crime (Sentences) Act 1997*.

⁴³⁴ Henham “Making Sense of the Crime (Sentences) Act 1977” (1998) 61 *Mod L Rev* 223 at 224-225.

neutralised the “two strikes” rule created by the provision when it ruled that only in exceptional circumstances could judges take into account whether the offender presented a danger to the public.⁴³⁵ The provision was eventually repealed by section 303 of the *Criminal Justice Act 2003*.⁴³⁶

3.228 Ashworth and Player have been highly critical of section 225 and its neighbouring provisions:

“These are unduly weak provisions to support the severely restrictive sentences that follow. There is no hint of recognition of the well-known fallibility of judgments of dangerousness. There is no requirement on courts to obtain relevant reports on the offender: a requirement to consult a report if there is one is inadequate. Moreover, the presumption applies where there is just one previous conviction of any of more than 150 specified offences, which vary considerably in their seriousness. It is doubtful whether the presumption is compatible with Article 5 of the Convention, insofar as it requires the courts to assume significant risk without investigating the particular facts and reports, and (effectively) places the burden on the defence to negative this.”⁴³⁷

3.229 In 2008 the Chief Inspector of Prisons and the Chief Inspector of Probation conducted a review of the indeterminate sentence for public protection.⁴³⁸ They observed that section 225 and section 226 had given rise to a large number of new and resource-intensive prisoners being fed into a prison system that was already under strain.⁴³⁹ This, they noted, had not only “increased pressure, and reduced manoeuvrability, within the prison system” but had also stretched the Probation Service.⁴⁴⁰ The consequence of this was:

“...IPP prisoners languishing in local prisons for months and years, unable to access the interventions they would need before the expiry of their often short tariff periods. A belated decision to move them to training prisons, without any additional resources and sometimes to one which did not offer relevant programmes, merely transferred the problem. By December 2007, when there were 3,700 IPP prisoners, it was estimated that 13% were over tariff. As a consequence, the Court of Appeal found that the Secretary of State had acted unlawfully, and that there had been ‘systematic failure to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the relevant provisions of the 2003 Act to function as intended.’”⁴⁴¹

This was by no means a new revelation. Similar comments had been made by the media in the years preceding the publication of the report.⁴⁴²

3.230 In 2008, section 225 was amended by section 13 of the *Criminal Justice and Immigration Act 2008*. The amendments provide that the courts now have a power, rather than a duty, to impose a sentence of imprisonment for public protection. They further provide that this power may only be exercised where either of two conditions is met, namely, the immediate offence would attract a notional minimum term of at least two years, or the offender has on a previous occasion been convicted of one of

⁴³⁵ Dyer “Ruling neutralises ‘Two Strikes’ Law” *The Guardian*, 10 November 2000.

⁴³⁶ *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* (Department of Justice, Canada) at 14.

⁴³⁷ Ashworth and Player “Criminal Justice Act 2003: The Sentencing Provisions” (2005) 68 *Mod L Rev* 822 at 835.

⁴³⁸ *The Indeterminate Sentence for Public Protection - A Thematic Review* (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008).

⁴³⁹ *The Indeterminate Sentence for Public Protection - A Thematic Review* (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008) at 3.

⁴⁴⁰ *The Indeterminate Sentence for Public Protection - A Thematic Review* (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008) at 3.

⁴⁴¹ *The Indeterminate Sentence for Public Protection - A Thematic Review* (HM Chief Inspector of Prisons and HM Chief Inspector of Probation, 2008) at 4.

⁴⁴² See, for instance, “Sentence designed for ‘Public Protection’” *The Telegraph* 20 August 2007.

the offences listed in the new Schedule 15A to the 2003 Act.⁴⁴³ Section 14 makes similar amendments to section 226.

(3) Scotland

3.231 In addition to the mandatory sentence for murder, there are mandatory sentences for certain drugs and firearms offences.

(a) Drug Offences

3.232 Section 205B of the *Criminal Procedure (Scotland) Act 1995*, as amended,⁴⁴⁴ introduces a mandatory sentencing regime in respect of third class A drug trafficking offences. Section 205B stipulates that the court impose a minimum term of imprisonment of 7 years on offenders aged 21 years or more and a minimum term of detention of 7 years on offenders aged 18 years and under 21 years.

(b) Firearms Offences

3.233 Section B4 of the *Scotland Act 1998* provides that legislating in relation to firearms is a power reserved to Westminster. Thus the control of firearms is regulated by the *Firearms Act 1968*, as amended.⁴⁴⁵ Section 51A⁴⁴⁶ of the *Firearms Act 1968* introduces a mandatory sentencing regime in respect of certain firearms offences. It stipulates that the Scottish courts impose a minimum sentence of three years for offenders aged 16 to 20 years and five years for those aged over 20 years.

3.234 As noted at paragraph 3.218, section 51A(1A)⁴⁴⁷ of the *Firearms Act 1968* provides that the offences to which the presumptive sentence applies are possession of a firearm with intent to injure;⁴⁴⁸ possession of a firearm with intent to cause fear of violence;⁴⁴⁹ use of a firearm to resist arrest;⁴⁵⁰ carrying a firearm with criminal intent;⁴⁵¹ carrying a firearm in a public place;⁴⁵² and trespassing in a building with a firearm.⁴⁵³ The minimum term must be imposed unless there are exceptional circumstances which would justify the court not doing so.

(c) Other

3.235 Section 206(1) of the *Criminal Procedure (Scotland) Act 1995* provides that no person shall be sentenced to imprisonment by a court of summary jurisdiction for a period of less than five days.⁴⁵⁴

(4) United States

3.236 Most states have presumptive or mandatory sentencing regimes in respect of drugs and/or firearms offences. Many states have presumptive or mandatory sentencing regimes in respect of other offences as well. In general, second or subsequent offences will attract enhanced penalties.⁴⁵⁵

⁴⁴³ Inserted by Schedule 5 to the *Criminal Justice and Immigration Act 2008*.

⁴⁴⁴ Inserted by section 2(1) of the *Crime and Punishment (Scotland) Act 1997*.

⁴⁴⁵ *Criminal Justice Act 2003*.

⁴⁴⁶ Inserted by section 287 of the *Criminal Justice Act 2003*.

⁴⁴⁷ As inserted by section 30 of the *Violent Crime Reduction Act 2006*.

⁴⁴⁸ Section 16 of the *Firearms Act 1968*.

⁴⁴⁹ Section 16A of the *Firearms Act 1968*.

⁴⁵⁰ Section 17 of the *Firearms Act 1968*.

⁴⁵¹ Section 18 of the *Firearms Act 1968*.

⁴⁵² Section 19 of the *Firearms Act 1968*.

⁴⁵³ Section 20(1) of the *Firearms Act 1968*.

⁴⁵⁴ Section 16 of the *Criminal Justice and Licensing (Scotland) Act 2010*, which does not appear to have been commenced, proposes to raise the term to 15 days.

⁴⁵⁵ Three-strikes legislation will be considered in Chapter 4.

(a) Alabama

(i) Drug Offences

3.237 In Alabama §13A-12-215 of the *Penal Code* prescribes a minimum sentence of 10 years for selling, furnishing or giving a controlled substance to a person under the age of 18 years. §13A-12-231 prescribes various minimum terms, ranging from three years to life imprisonment without parole, for drug trafficking.⁴⁵⁶ §13A-12-231(13) stipulates that an additional penalty of five years be imposed for drug trafficking while in possession of a firearm. §13A-12-250 stipulates that an additional penalty of five years be imposed for selling drugs within a three-mile radius of a school, college or university. §13A-12-270 stipulates that an additional penalty of five years be imposed for selling drugs within a three-mile radius of a housing project. §13A-12-233 prescribes a minimum term of 25 years without parole for running a drug trafficking enterprise and life without parole for a second offence.

(ii) Firearms Offences

3.238 §13A-5-6 of the *Penal Code* prescribes a minimum sentence of 20 years for the commission of a Class A felony with a firearm and 10 years for the commission of a Class B or C felony. §13A-11-60 stipulates that an additional penalty of three years be imposed for possession and sale of brass or steel Teflon-coated handgun ammunition.

(iii) Other

3.239 Minimum sentences are also prescribed in respect of a fourth or subsequent conviction for driving under the influence within a five-year period;⁴⁵⁷ driving under the influence with a passenger under 14 years of age;⁴⁵⁸ robbery of a pharmacy;⁴⁵⁹ second or subsequent offences of domestic violence;⁴⁶⁰ terrorism;⁴⁶¹ certain sexual offences against children;⁴⁶² hate crimes;⁴⁶³ falsely reporting an incident;⁴⁶⁴ and possession, transportation, receipt or use of a destructive device, explosive, bacteriological or biological weapon.⁴⁶⁵ There are also provisions dealing with habitual offenders.⁴⁶⁶

(b) Maine

(i) Drugs Offences

⁴⁵⁶ §13A-12-232(b) provides that the court may suspend or reduce the mandatory minimum prison term required by statute, but only if (1) the mandatory minimum required by statute is not life without parole, (2) the prosecuting attorney files a motion requesting a reduced or suspended sentence, and (3) the offender provides substantial assistance in the arrest or conviction of any accomplices, accessories, co-conspirators or principals. In addition, §15-18-8(a)(1) (any prison sentence under 20 years except for Class A and B felony child sex offences) permits (but does not require) judges to impose a split sentence in which only part of the sentence is served and the rest of the sentence is suspended, if “the judge presiding over the case is satisfied that the ends of justice and the best interests of the public as well s the defendant will be served” by splitting the sentence.

⁴⁵⁷ §32-5A-191f(h).

⁴⁵⁸ §32A-5A-191(n).

⁴⁵⁹ §13A-8-51(2) and §13A-8-52.

⁴⁶⁰ §13A-6-130 and §13A-6-131.

⁴⁶¹ §13A-10-152.

⁴⁶² §15-20-21(5); §13A-5-6(4) and (5); §13A-5-110; and §13A-6-111.

⁴⁶³ §13A-5-13.

⁴⁶⁴ §13A-11-11.

⁴⁶⁵ §13A-7-44.

⁴⁶⁶ *Habitual Felony Offender Act*.

3.240 In Maine §1105-A of the *Penal Code* prescribes a variety of minimum sentences, ranging from one year to four years, for trafficking a scheduled drug with a child under the age of 18 or with the aid or conspiring of a child under the age of 18; with a prior conviction for a Class A, B or C drug offence; with a firearm; or on a school bus or within 1,000 feet of a school zone. §1105-B prescribes a minimum sentence of two years for trafficking or furnishing a counterfeit drug to a child under the age of 18; with a prior conviction for a Class A, B or C drug offence; with a firearm; or trafficking or furnishing a counterfeit drug and death or serious bodily injury is caused by the use of the drug. §1105-C prescribes a variety of minimum sentences, ranging from one year to two years, for furnishing a scheduled drug to a child under the age of 18 or with the aid or conspiring of a child under the age of 18; with a prior conviction for a Class A, B or C drug offence; with a firearm; or furnishing a scheduled drug on a school bus or within 1,000 feet of a school zone. §1105-D prescribes a variety of minimum sentences, ranging from one year to four years, for cultivating marijuana plants with a prior conviction for a Class A, B or C drug offence; with a firearm; with the aid or conspiring of a child; or cultivating marijuana plants within 1,000 feet of a school zone.⁴⁶⁷

(ii) Firearms Offences

3.241 §1252(5) prescribes a minimum sentence of four years for committing a Class A crime while using a firearm against a person; two years for committing a Class B crime while using a firearm against a person; and one year for committing a Class C crime while using a firearm against a person.

(c) Virginia

(i) Drugs Offences

3.242 In Virginia §18.2-248.1(d) of the *Penal Code* prescribes a minimum sentence of five years for the sale or distribution of marijuana, where it is the offender's third or subsequent felony. §18.2-248 prescribes a variety of minimum sentences, ranging from three years to 40 years, for distributing or transporting marijuana. §18.2-255(A,i) prescribes a variety of minimum sentences, ranging from two years to five years, for selling a certain amount of marijuana to a minor. §18.2-255(A,ii) prescribes a variety of minimum sentences, ranging from two years to five years, for selling a certain amount of marijuana, where the minor assists in distribution. §18.2-248 prescribes a variety of minimum sentences, ranging from 20 years to life, where there is a continuing criminal enterprise grossing specified amounts of money. §18.2-248 also prescribes a variety of minimum sentences, ranging from 20 years to life, for the distribution of certain quantities of certain drugs as part of a continuing criminal enterprise. §18.2-248 also prescribes a variety of minimum sentences, ranging from three years to 20 years, for the distribution of certain quantities of certain drugs. §18.2-248(C) prescribes a minimum sentence of five years for a third or subsequent offence of selling or possessing with intent to sell or distribute Schedule I or II drugs. §18.2-248(C1) prescribes a minimum sentence of three years for a third or subsequent offence of manufacturing metamphetamine. §18.2-248.01 prescribes a variety of minimum terms, ranging from three years to 10 years for transporting Schedule I or II drugs to the Commonwealth. §18.2-255.2 prescribes a minimum sentence of one year for a second or subsequent offence of distributing controlled substances on school property. §18.2-248.5(A) prescribes a minimum sentence of 6 months for the offence of selling or distributing anabolic steroids. §18.2-248(H) prescribes a minimum sentence of 20 years for the distribution of a Schedule I or II drug.⁴⁶⁸

⁴⁶⁷ §1252(5-A)(B)-(C) provides that the courts may depart from the mandatory minimum sentences if they find substantial evidence for all three of the following elements: (1) Imposition of the mandatory term will result in substantial injustice to the defendant; (2) failure to impose the mandatory term will not have an adverse effect on public safety; and (3) failure to impose the mandatory term will not appreciably impair the deterrent effect of the mandatory sentence. Then the court must find two additional elements: (1) the defendant is an appropriate candidate for an intensive supervision programme, but would be ineligible if given a mandatory sentence and (2) based on the defendant's background, attitude and prospects for rehabilitation and the nature of the victim and offence, imposing the mandatory sentence would frustrate the general purpose of sentencing.

⁴⁶⁸ §18.2-248 provides that if the defendant has no prior conviction, did not use violence or the threat of violence, the offence did not result in death or serious bodily injury and the defendant was not a central figure in the

(ii) Firearms Offences

3.243 §18.2-53.1 prescribes a minimum sentence of three years for using a firearm in the commission of a felony; and five years for a second or subsequent offence. §18.2-308.4(B) and (C) prescribe minimum sentences of two to five years for possessing or selling certain types of drug while possessing a firearm. §18.2-308.2(A) prescribes minimum sentences of two to five years for possession or transport of a firearm where the offender is a convicted felon. §18.2-308.2:2(M) prescribes a minimum sentence of five years for the provision of more than one firearm to an ineligible person. §18.2-308.1(B) prescribes a minimum sentence of five years for the use of a firearm on school property.

(iii) Other

3.244 Minimum sentences are also prescribed in respect of the illicit possession, importation, sale or distribution of cigarettes;⁴⁶⁹ certain types of assault;⁴⁷⁰ escape from a correctional facility;⁴⁷¹ identity theft;⁴⁷² certain gang-related offences in a school zone;⁴⁷³ certain types of manslaughter;⁴⁷⁴ certain types of sexual offence against children;⁴⁷⁵ violations of certain protective orders;⁴⁷⁶ certain types of sexual assault;⁴⁷⁷ driving while intoxicated;⁴⁷⁸ operating a vehicle while licence revoked;⁴⁷⁹ reckless driving causing death;⁴⁸⁰ certain types of hate crime;⁴⁸¹ and certain types of vandalism.⁴⁸² There is also a provision dealing with habitual offenders.⁴⁸³

(d) Federal

(i) Drugs Offences

3.245 §841(a), §841(b)(1)(A) and §2D1.1 of the *Penal Code* prescribe a variety of minimum sentences, ranging from five years to life, for manufacturing, distributing or possessing drugs, with intent to distribute. The sentences escalate for second and subsequent offences. §846, §2D1.1, §2D1.2, §2D1.5 - §2D1.13, §2D2.1, §2D2.2, §2D3.1 and §2D3.2 stipulate that the mandatory minimum sentence for the underlying offence be imposed for attempts and conspiracies to commit any drug trafficking or possession offence. §848(a) and §2D1.5 prescribe a minimum sentence of 20 years for a continuing

criminal enterprise and provided substantial assistance to the government prior to sentencing, the five and 20 year mandatory minimums will not apply for manufacturing. §18.2-248.1 provides that if the individual can prove that he or she trafficked marijuana only with the intent to assist an individual and not to profit, he or she will be sentenced as committing a class 1 misdemeanour.

⁴⁶⁹ §3.2-4212(D,i) and §3.2-4212(D,ii).

⁴⁷⁰ §18.2-51.1; §18.2-57(A); §18.2-57(B); §18.2-57(C); and §18.2-57(D).

⁴⁷¹ §53.1-203(1).

⁴⁷² §18.2-186.4.

⁴⁷³ §18.2-46.2.

⁴⁷⁴ §18.2-36.1(B) and §18.2-36.2(B).

⁴⁷⁵ §18.2-374.1:1(C); §18.2-374.1(B,1); §18.2-374.1(B,2); §18.2-374.1(B,3); §18.2-374.1(B,4); §18.2-374.3(C); and §18.2-374.3(D).

⁴⁷⁶ §16.1-253.2.

⁴⁷⁷ §18.2-61(A,iii); §18.2-67.1(A,1); §18.2-67.2(A,1); §18.2-67.5:2; and §18.2-67.5:3.

⁴⁷⁸ §18.2-266; §46.2-341.24; §46.2-357(B,1); §46.2-357(B,2); and §46.2-357(B,3).

⁴⁷⁹ §46.2-301; §46.2-391(D,1); §46.2-391(D,2a, i); §46.2-391(D,2a,ii); and §46.2-391(D,3).

⁴⁸⁰ §46.2-865.1(A,2).

⁴⁸¹ §18.2-121; §18.2-57(A); and §18.2-57(B).

⁴⁸² §18.2-154.

⁴⁸³ §19.2-297.1.

criminal enterprise, and 30 years for a second or subsequent offence. §848(b) and §2D1.5 prescribe a minimum sentence of life for acting as principal administrator, organiser or leader of a continuing criminal enterprise. §848(e) and §2d1.5 prescribe a minimum sentence of 20 years for engaging in a continuing criminal enterprise and intentionally killing an individual or law enforcement officer. §859 and §2D1.2 prescribe a minimum sentence of one year or the minimum required by §841(b), whichever is longer, for distribution of drugs to persons under the age of 21. §860(a) and §2D1.2 prescribe a minimum sentence of one year or the minimum required by §841(b), whichever is longer, for distribution of a controlled substance near a school or similar facility; three years or the minimum required by §841(b), whichever is longer, for a second offence; and the minimum required by §841(b)(1)(A) for a third offence. §861 and §2D1.2 prescribes the minimum required by §841(b)(1)(A) for the employment or use of persons under 18 in drug operations. §861(b), (c) and §2D1.2 prescribe a minimum sentence of one year for knowingly and intentionally employing or using a person under 18 years in drug operations; one year for a second offence; and the minimum required by §841(b)(1)(A) for a third offence. §861(f) and §2D1.2 prescribe a minimum sentence of one year for knowingly or intentionally distributing a controlled substance to a pregnant individual. §960(a), §960(b) and §2D1.1 prescribe a variety of minimum sentences, ranging from five years to life, depending on whether it is a first or subsequent offence, for the unlawful importation or exportation of drugs. §963; §2D1.1, §2D1.2, §2D1.5-§2D1.13, §2D2.1, §2D2.2, §2D3.1 and §2D3.2 prescribe the mandatory minimum sentence for the underlying offence for attempts and conspiracies to commit any offence of importation or exportation.

(ii) Firearms Offences

3.246 §924(c)(1)(A)(i) and §2K2.4 stipulate that an additional penalty of five years be imposed for using or carrying a firearm during a crime of violence or drug trafficking crime. §924(c)(1)(A)(ii) and §2K2.4 stipulate that an additional penalty of 7 years be imposed for brandishing a firearm during a crime of violence or drug trafficking crime. §924(c)(1)(A)(iii) and §2K2.4 stipulate that an additional penalty of 10 years be imposed for discharging a firearm during a crime of violence or drug trafficking crime. §924(c)(1)(B)(i) and §2K2.4 stipulate that an additional penalty of 10 years be imposed for possessing a firearm that is a short-barrelled rifle or shotgun. §924(c)(1)(B)(ii) and §2K2.4 stipulate that an additional penalty of 30 years be imposed for possessing a machinegun, destructive device or firearm equipped with a silencer or muffler. §924(c)(1)(C)(i) and §2K2.4 stipulate that an additional penalty of 25 years be imposed for a second or subsequent conviction under §924(c)(1)(A). §924(c)(1)(C)(ii) and §2K2.4 prescribe a minimum sentence of life for a second or subsequent conviction under §924(c)(1)(A), with a machine gun, destructive device or firearm equipped with a silencer or muffler. §924(c)(5)(A) and §2K2.4 stipulate that an additional penalty of 15 years be imposed for possession or use of armour-piercing ammunition during a crime of violence or drug trafficking crime. §924(e)(1) and §2K2.4 prescribe a minimum sentence of 15 years for possession of a firearm or ammunition by a fugitive offender or addict, who has three convictions for violent felonies or drug offences. §929(a)(1) and §2K2.4 stipulate that an additional penalty of five years be imposed for carrying a firearm during a violent offence or drug trafficking crime.

(iii) Other

3.247 Minimum sentences are also prescribed for certain immigration offences;⁴⁸⁴ identity theft;⁴⁸⁵ sexual offences against children;⁴⁸⁶ production, possession or use of fire or explosives;⁴⁸⁷ airplane

⁴⁸⁴ §1324(a)(2)(B)(i) and §2L1.1; §1324(a)(2)(B)(ii) and §2L1.1; and §1326(b)(3) and §2L1.2.

⁴⁸⁵ §1028A(a)(1) and §2B1.6; and §1028A(a)(2) and §2B1.6.

⁴⁸⁶ §1591(b)(1), §2G1.1, §2D2.1 and §2G1.3; §1591(b)(2), §2G1.1, §2D2.1 and §2G1.3; §2251A(a) and §2G2.3; §2251A(b) and §2G2.3; §2241(c) and §2A3.1; §2250(c) and §2A3.6; §1466A(a), §1466A(b) and §2G2.2; §2251(a), §2251(e) and §2G2.1; §2251(b), §2251(e) and §2G2.1; §2251(c), §2251(e), §2G2.1 and §2G2.2; §2251(d), §2251(e) and §2G2.2; §2252(a)(1), §2252(a)(3) and §2G2.2; §2252(a)(2) and §2G2.2; §2252(a)(4) and §2G2.2; §2252A(a)(1) to §2252A(a)(4), §2252A(a)(6) and §2G2.2; §2252A(a)(5) and §2G2.2; §2252A(g) and §2G2.2; §2257(i) and §2G2.5; §2260(a) and §2G2.1; §2260(b) and §2G2.2; §2260A and §2A3.5; §2422(b), §2G1.1 and §2G1.3; §2423(a) and §2G1.3; §2423(e) and §2G1.3; §3599(e)(1); and §3599(c)(1).

hijacking;⁴⁸⁸ obstruction of justice;⁴⁸⁹ illegal food stamp activity;⁴⁹⁰ kidnapping;⁴⁹¹ hostage-taking;⁴⁹² bank robbery, racketeering, and organised crime;⁴⁹³ fraud, bribery and white collar crime;⁴⁹⁴ piracy;⁴⁹⁵ certain types of assault or battery;⁴⁹⁶ interference with civil service examinations;⁴⁹⁷ stalking in violation of a restraining order;⁴⁹⁸ treason;⁴⁹⁹ failure to report seaboard saloon purchases;⁵⁰⁰ practice of pharmacy and sale of poisons in China;⁵⁰¹ navigable water regulation violation;⁵⁰² deposit of refuse or obstruction of navigable waterway;⁵⁰³ deposit of refuse in New York or Baltimore harbours;⁵⁰⁴ violation of merchant marine act;⁵⁰⁵ refusal to operate railroad or telegraph lines;⁵⁰⁶ sale or donation of HIV positive tissue or bodily fluids to another person for subsequent use other than medical research;⁵⁰⁷ and trespassing on federal land for hunting or shooting.⁵⁰⁸ There are also provisions dealing with habitual offenders.⁵⁰⁹

(5) Canada

(a) Drug Offences

3.248 Currently, drug offences are not subject to mandatory minimum sentences in Canada. The *Controlled Drugs and Substances Act 1996*,⁵¹⁰ which regulates the possession, use and distribution of

⁴⁸⁷ §1245(b); §229A(a)(2); §33(b), §2A2.1, §2A2.2, §2B1.1 and §2K1.4; §844(f)(1), §2K1.4 and §2X1.1; §844(h), §2K1.4 and §2K2.4; §844(i) and §2K1.4; §844(o) and §2K2.4; and §2272(b) and §2M6.1.

⁴⁸⁸ §46502(a)(2)(A), §2A5.1 and §2X1.1; §46502(a)(2)(B), §2A5.1 and §2X1.1; §46502(b)(1)(A), §2A5.1 and §2X1.1; §46502(b)(1)(B), §2A5.1 and §2X1.1; and §46506(1) and §2A5.3.

⁴⁸⁹ §192; §390; §13a and §2B1.1; §13b; §15b(k); and §195(3) and §2N2.1.

⁴⁹⁰ §2024(b)(1) and §2B1.1; and §2024(c) and §2B1.1.

⁴⁹¹ §1201(g)(1) and §3559(f)(2).

⁴⁹² §1203(a), §2A4.1 and §2X1.1.

⁴⁹³ §225(a), §2B1.1 and §2B4.1; §1956(h) and §2S1.1; and §2113(e), §2A1.1 and §2B3.1.

⁴⁹⁴ §4221 and §2B1.1; §622 and §2C1.1; §447; §220(e); §617; §630; and §8.

⁴⁹⁵ §1651; §1652; §1653; §1655; §1658(b); and §1661.

⁴⁹⁶ §1389.

⁴⁹⁷ §1917.

⁴⁹⁸ §2261(b)(6) and §2M1.1.

⁴⁹⁹ §2381 and §2A6.2.

⁵⁰⁰ §283 and §2T3.1.

⁵⁰¹ §212.

⁵⁰² §410

⁵⁰³ §411 and §2Q1.3.

⁵⁰⁴ §441.

⁵⁰⁵ §58109(a).

⁵⁰⁶ §13.

⁵⁰⁷ §1122.

⁵⁰⁸ §414

⁵⁰⁹ §3559(c)(1).

⁵¹⁰ Dupuis *Legislative Summary of Bill S-10: An Act to Amend the Controlled Drugs and Substances Act and to make related and consequential Amendments to other Acts* (Parliament, No 40-3-S10E, 2010). Available at http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=s10&source=library_prb&Parl=40&Ses=3&Language=E#fn20. (Last accessed on 23.06.11).

drugs does, however, provide for a maximum sentence of life imprisonment for the most serious drug offences.⁵¹¹

3.249 In May 2010 the Leader of the Government in the Senate, Ms Marjory Lebreton, introduced Bill S-10 in the Senate.⁵¹² The Bill proposes to amend the *Controlled Drugs and Substances Act 1996* to provide for minimum sentences for serious drug offences such as producing, dealing or trafficking in drugs for organised crime purposes, while using a weapon or violence, or in or near a school or any public place that is normally frequented by persons under the age of 18 years. The Bill contains an exception that allows the courts not to impose a mandatory sentence if the offender successfully completes a Drug Treatment Court programme or a treatment programme, under subsection 720(2) of the Criminal Code that is approved by a province and under the supervision of the court.

3.250 Dupuis observes that vigorous debate has surrounded Bill S-10 and its predecessors.⁵¹³ On one side it has been argued that mandatory sentencing addresses the problem of judges prioritising the rehabilitation of offenders over crime deterrence and the right of law-abiding citizens to go about their lives without fear; destroys the criminal infrastructure that keeps the crime cycle going; encourages addicts to choose drug treatment programmes rather than go to prison; is an important deterrent and denouncement by society; and incapacitates offenders by keeping them off the streets. On the other side it has been argued that mandatory sentencing strips judges of discretion in sentencing; risks turning Canadian prisons into “US-style inmate warehouses”; draws funds away from social programmes; and has not proven to be an effective deterrent.⁵¹⁴

(b) Firearms Offences

3.251 Certain offences involving firearms or other weapons attract a mandatory minimum sentence in Canada.

3.252 Section 343 of the Canadian *Criminal Code* provides that every person who commits robbery is liable, if a restricted firearm or prohibited firearm is used in the commission of the offence, or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organisation, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years, in the case of a first offence, and 7 years, in the case of a second or subsequent offence. In any other case where a firearm is used in the commission of the offence, the person is liable to imprisonment for life and to a minimum punishment of imprisonment for a term of four years and, in any other case, to imprisonment for life.

3.253 Section 346(1.1) provides that every person who commits extortion is guilty of an indictable offence and liable, if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organisation, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years, in the case of a first offence, and 7 years, in the case of a second or subsequent offence. In any other case where a firearm is used in the commission of the offence, the person is liable to imprisonment for life and to a minimum punishment of imprisonment for a term of four years and, in any other case, to imprisonment for life.

⁵¹¹ Section 7 of the *Controlled Drugs and Substances Act 1996*.

⁵¹² A similar predecessor bill - Bill C-15 - was introduced in the House of Commons on 27th February 2009 by the Minister for Justice, Mr Robert Nicholson. Although Bill C-15 passed the House of Commons and the Senate, with certain amendments, it died on the Order Paper on 30 December 2009 when Parliament was prorogued. Bill C-15 was almost identical to Bill C-26, which received a second reading during the second session of the 39th Parliament, but which died on the Order Paper when Parliament was dissolved on 7th September 2008.

⁵¹³ Dupuis *Legislative Summary of Bill S-10: An Act to Amend the Controlled Drugs and Substances Act and to make related and consequential Amendments to other Acts* (Parliament, No 40-3-S10E, 2010) at 15. Available at http://www.parl.gc.ca/About/Parliament/LegislativeSummaries/bills_ls.asp?ls=s10&source=library_prb&Parl=40&Ses=3&Language=E#fn20. Last accessed on 23rd June 2011.

⁵¹⁴ See also McLemore “Why Canada should reject the Bill S-10” (Human Rights Watch, 2011).

3.254 Section 92(1) provides that it is an offence to possess a firearm knowingly without a licence or a registration certificate. Section 92(2) provides that it is an offence to possess a prohibited weapon, a restricted weapon, a prohibited device, other than a replica firearm, or any prohibited ammunition knowingly without an appropriate licence under which the person may possess it. Section 92(3) provides that every person who commits an offence under subsection (1) or (2) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years, in the case of a first offence, and to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of one year, in the case of a second offence, and to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of two years less a day, in the case of a third or subsequent offence.

3.255 Section 95(1) provides that every person commits an offence who, in any place possesses a loaded prohibited firearm or restricted firearm, or an unloaded prohibited firearm or restricted firearm together with readily accessible ammunition that is capable of being discharged in the firearm, unless the person is the holder of an authorisation or a licence under which the person may possess the firearm in that place; and the registration certificate for the firearm. Section 95(2) provides that every person who commits an offence under subsection (1) is guilty of an indictable offence and liable to imprisonment for a term not exceeding 10 years and to a minimum punishment of imprisonment for a term of three years, in the case of a first offence, and five years, in the case of a second or subsequent offence.

3.256 Section 272(2) provides that every person who commits a sexual assault⁵¹⁵ is guilty of an indictable offence and liable, if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organisation, to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of five years, in the case of a first offence, and 7 years, in the case of a second or subsequent offence. In any other case where a firearm is used in the commission of the offence, the person is liable to imprisonment for a term not exceeding 14 years and to a minimum punishment of imprisonment for a term of four years; and to imprisonment for a term not exceeding 14 years, in any other case.

3.257 Section 273(2) provides that every person who commits an aggravated sexual assault⁵¹⁶ is guilty of an indictable offence and liable, if a restricted firearm or prohibited firearm is used in the commission of the offence or if any firearm is used in the commission of the offence and the offence is committed for the benefit of, at the direction of, or in association with, a criminal organisation, to imprisonment for life and to a minimum punishment of imprisonment for a term of five years, in the case of a first offence, and 7 years, in the case of a second or subsequent offence. In any other case where a firearm is used in the commission of the offence, the person is liable to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and, in any other case, to imprisonment for life.

(6) Australia

3.258 In Australia mandatory sentencing has a long history.⁵¹⁷ During the eighteenth and nineteenth centuries mandatory sentencing was used for a wide variety of offences. During the nineteenth century, however, this approach was largely abandoned in favour of parliament setting the maximum penalty, with the sentencing judge responsible for determining the appropriate sentence for the individual offender.

(a) New South Wales

3.259 Sentencing in New South Wales is regulated by the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* which amended the *Crimes (Sentencing Procedure) Act 1999*.⁵¹⁸ These do not appear to prescribe mandatory minimum sentences for any

⁵¹⁵ Section 272(1).

⁵¹⁶ Section 273(1).

⁵¹⁷ Roche "Mandatory Sentencing" No 138, Trends & Issues in Crime and Criminal Justice, (Australian Institute of Criminology, 1999) at 1.

⁵¹⁸ *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* (Department of Justice, Canada) at 29.

offence. However, section 54A to section 54D of the *Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 2002* does create standard non-parole periods for a number of offences, including armed robbery but not drug offences. When sentencing an offender for one of these offences, the court must, if it decides that imprisonment is appropriate, be guided by the minimum non-parole period. This arrangement restricts a court's discretion with respect to the duration of custody, while leaving a court free to impose a non-custodial sanction.

(b) Northern Territory

3.260 In the Northern Territory the *Sentencing Act 1995*, as amended in 1997, introduced mandatory sentences in respect of a broad range of property offences. It prescribed a minimum sentence of 14 days for a first offence; 90 days for second offence and a year for a third offence.⁵¹⁹ The same amendments also imposed mandatory minimum terms of imprisonment on juveniles: 28 days for juvenile repeat property offenders (aged 15 or 16) with escalating penalties for subsequent offences. When the mandatory sentencing regime was associated with a number of deaths in prison a widespread grass roots campaign led to their amendment and eventual repeal in 2001.⁵²⁰

3.261 In 1999 a wide range of violence offences and sexual offences, scheduled in the *Sentencing Act*, became subject to a mandatory sentencing regime. Regarding violence offences, the mandatory scheme which expired in 2008, applied to second or subsequent offences. Regarding sexual offences, it applies to first-time offenders. It prescribes the type of sentence – mandatory imprisonment – but does not prescribe the minimum sentences to be applied. In December 2008, there was an amendment to section 78B(a) of the *Sentencing Act*, which introduced a sentencing regime of mandatory imprisonment for first-time assault offenders in situations where the injury interferes with the victim's health or results in serious harm.⁵²¹

3.262 In addition, section 37 of the *Misuse of Drugs Act* provides that a 28-day presumptive minimum sentence must be imposed for a number of serious drug offences. The court is not required to impose the sentence if, having regard to the particular circumstances of the offence or the offender, the court is of the opinion that the penalty should not be imposed.

3.263 Finally, section 121 of the *Domestic and Family Violence Act* prescribes a presumptive minimum sentence of 7 days for a second or subsequent breach of a domestic violence order. The provision does not apply, however, if no harm is caused or if the court is satisfied that it is not appropriate in the circumstances to record a conviction and sentence.⁵²²

3.264 A persistent and major criticism of mandatory or presumptive sentencing in Australia is that indigenous adults are much more likely to be affected than non-indigenous adults.⁵²³

(c) Queensland

3.265 Sentencing in Queensland is regulated by the *Penalties and Sentences Act 1992*.⁵²⁴ This does not appear to prescribe mandatory minimum sentences for any offence.

⁵¹⁹ Roche "Mandatory Sentencing" No 138, Trends & Issues in Crime and Criminal Justice, (Australian Institute of Criminology, 1999) at 1-2.

⁵²⁰ *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* (Department of Justice, Canada) at 25.

⁵²¹ Jackson and Hardy "The Impact of Mandatory Sentencing on Indigenous Offenders" Sentencing Conference 2010, Canberra 6 and 7 February 2010, National Judicial College of Australia. Cranny "Mandatory Sentencing – Where From, Where to and Why?" available at <http://www.isrcl.org/Papers/2006/Cranny-Paper.pdf> (accessed on 24 June 2011).

⁵²² This provision came into force on 1 July 2008. Under previous legislation there was no proviso regarding the non-application of the presumptive minimum sentence.

⁵²³ Roche "Mandatory Sentencing" No 138, Trends & Issues in Crime and Criminal Justice, (Australian Institute of Criminology, 1999) at 1-2.

⁵²⁴ *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* (Department of Justice, Canada) at 28.

(d) Victoria

3.266 Victoria does not appear to have mandatory minimum sentences for any offence.⁵²⁵

(e) Western Australia

3.267 In Western Australia, under 1996 amendments to the *Criminal Code (WA)*, an adult or juvenile offender convicted for the third time or more for a home burglary must receive a 12-month minimum sentence.⁵²⁶ The Aboriginal Justice Council has noted that the mandatory sentence has had no impact on burglary rates but has had a disproportionate impact on Aboriginal offenders appearing before the courts.⁵²⁷

(f) Commonwealth

3.268 At the federal level, only one Act - the *Migration Act 1958* - provides for mandatory minimum sentences. Under section 233C of the Act, the court is required to impose a sentence of at least five years imprisonment for the offence of people smuggling - or at least 8 years if the conviction is a repeat offence - unless it can be proven that the offender was under the age of 18 years when the offence was committed. In addition, the court is required to fix a minimum non-parole period of three years, or five years if the conviction is for a repeat offence.⁵²⁸

(7) New Zealand

3.269 In New Zealand, there do not appear to be mandatory minimum sentences for any offence,⁵²⁹ despite pressure to introduce them.⁵³⁰

E Conclusions and Provisional Recommendations

(1) Possible extension of presumptive sentencing regimes

3.270 As noted in Chapter 2, the Supreme Court has ruled that the Oireachtas is entitled to prescribe a mandatory minimum sentence whenever it considers that a mandatory minimum sentence is an appropriate penalty.⁵³¹ It thus follows that the Oireachtas is entitled to prescribe a mandatory minimum sentence *subject to exceptions* whenever it considers that such a sentence is an appropriate penalty. It remains to be seen, however, whether it would be advisable for the Oireachtas to extend the use of mandatory minimum sentences subject to exceptions to offences other than drugs and firearms offences.

3.271 The Commission notes that there are a number of issues which must be considered in this regard. First, it has been observed that mandatory minimum sentences constrain judicial discretion and thus give rise to a greater risk of disproportionate sentencing. The Commission notes, however, that this argument is stronger in relation to mandatory sentences, which entirely preclude judicial discretion, than in relation to mandatory minimum sentences subject to exceptions, which permit some level of judicial discretion. These enable the sentencing court to impose a sentence anywhere between the presumptive minimum and the statutory maximum or, where there are exceptional and specific circumstances, a sentence less than the presumptive minimum. The fact that there is some level of judicial discretion

⁵²⁵ *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* (Department of Justice, Canada) at 28.

⁵²⁶ Roche "Mandatory Sentencing" No 138, *Trends & Issues in Crime and Criminal Justice*, (Australian Institute of Criminology, 1999) at 2.

⁵²⁷ Aboriginal Justice Council 2001.

⁵²⁸ *Same Crime, Same Time* Report 103 (Australian Law Reform Commission, 2006) at 539.

⁵²⁹ *Mandatory Sentences of Imprisonment in Common Law Jurisdictions* (Department of Justice, Canada) at 31.

⁵³⁰ Roberts "Sentencing Reform in New Zealand: An Analysis of the Sentencing Act 2002" (2003) *Australian and New Zealand Journal of Criminology*.

⁵³¹ *Deaton v Attorney General* [1963] IR 170, 181; and *State (P Woods) v Attorney General* [1969] IR 385, 403-404.

remains the case even though the Oireachtas has made it increasingly clear that the circumstances in which a sentence below the mandatory minimum may be imposed must be truly exceptional and specific.

3.272 It has also been noted that mandatory sentencing causes sentencing discretion to be transferred, in effect if not in terms of the actual text of the legislation, from the courts to the prosecution and defence.

3.273 In addition, it has been observed that the mandatory sentencing regime applicable to certain drugs and firearms offences creates a one-strike rule which is severe by comparison to the two-strike and three-strike rules in other countries.⁵³² The Commission notes that this argument is reinforced by the fact that the 10 year minimum prescribed for many of these offences is long by international standards and applies, where the offence is a possession offence, to those at the lower end of the criminal chain.

3.274 On a related note, it has been observed that the factor which triggers the operation of a mandatory minimum sentence should be clearly defined and unequivocal.⁵³³ In this regard, it has been asserted that the use of “market value” as the triggering factor for the minimum sentence applicable to certain drugs offences is less than satisfactory.

3.275 It has also been noted that mandatory sentencing provisions tend to target low-end offenders, such as couriers.

3.276 Furthermore, it has been asserted that the mandatory minimum sentence may not be a sufficiently sophisticated response to the complex social issues which contribute to certain offences. In relation to firearms offences, for instance, it has been argued that educational and psychological approaches would be more appropriate to address the social deprivation and machismo which regularly feature in firearms cases. Having regard to the particular link between social deprivation and crime, it has also been noted that mandatory sentences tend to disproportionately affect certain socio-economic and ethnic groups.

3.277 It has also been argued that the mandatory minimum sentence is not a cost-effective response to crime. In relation to drugs offences, for instance, it has been argued that revenue would be better invested in rehabilitation programmes and improving the existing criminal justice framework than in introducing a mandatory sentencing regime. The Commission notes that this argument is particularly relevant in Ireland where the prison system is acutely overcrowded and under-resourced. A mandatory sentencing regime which does not permit of early release except in very limited circumstances means that more people will be in prison for a longer period of time. This, in turn, affects the extent to which imprisonment can deliver on the principles and purposes of sentencing, outlined in Chapter 1, in particular, rehabilitation.

3.278 It has also been asserted that mandatory sentencing regimes are too rigid to keep abreast of evolving penal philosophy.

3.279 While a comparative analysis of common law countries which have introduced mandatory sentencing regimes is of interest, the Commission cautions against relying too heavily on their example. In this regard, it may be observed that the rationale for introducing mandatory sentencing regimes varies from country to country but, for the most part, has been a reactionary response to particularly egregious incidents, heinous crimes or persistent criminality. While there has been near universal acceptance of mandatory sentencing for drugs and firearms offences, only some countries have extended the use of mandatory sentencing.

(2) *Provisional recommendations on drugs and firearms presumptive sentencing regimes*

3.280 The Commission accepts that presumptive sentencing regimes may be suitable in narrowly prescribed circumstances where the offences have a particularly serious impact on society, such as with certain drugs offences and certain firearms offences. Having regard to the general aims and principles set out in Chapter 1, however, the Commission observes that there is a particular need to ensure that these presumptive sentencing regimes are achieving their stated objectives.

⁵³² See Section D.

⁵³³ See paragraph 3.34.

3.281 In this regard, the Commission notes that one objective was to increase the severity of sentencing and that another objective was to deter offenders. While the presumptive sentencing regimes may have succeeded in increasing the severity of sentencing for certain drugs and firearms offences it is arguable, at least, in respect of the regime under the *Misuse of Drugs Act 1977* that the regime has not reduced the level of criminality. Instead, it has resulted in a discriminatory system of sentencing where all cases are treated alike regardless of differences in the individual circumstances of the offenders. The drugs industry has adapted to the change in sentencing by using expendable couriers to hold and transport drugs. In the majority of case, it is these low-level offenders who are being caught under the presumptive regime rather than those at the top of the drugs industry. This has resulted in a bulge in the prison system of low-level drugs offenders. Furthermore, as a guilty plea will generally result in the presumptive minimum sentence not being applied, there is now less incentive to fight a case or, in consequence, test the legislation.

3.282 The Commission has, therefore, concluded that the presumptive sentencing regime, as it applies in the case of certain drugs and firearms offences, should not be extended to any other offences but should be reviewed because, while it has succeeded in one objective, namely, an increased severity in sentencing for certain drugs and firearms offences, it has not been established that it has achieved another general aim of the criminal justice system, namely reduced levels of criminality. The Commission notes that, instead, the presumptive drugs offences regime (on which the effects in practice are, in particular, clear) has had the following results: a discriminatory system of sentencing where all cases are treated alike regardless of differences in the individual circumstances of the offenders; the adaptation of the illegal drugs industry to the sentencing regime by using expendable couriers to hold and transport drugs; that these relatively low-level offenders, rather than those at the top of the drugs industry, are being apprehended and dealt with under the presumptive regime; a high level of guilty pleas in order to avoid the presumptive minimum sentence; and a consequent bulge in the prison system comprising low-level drugs offenders.

3.283 *The Commission provisionally recommends that the presumptive sentencing regime, as it applies in the case of certain drugs and firearms offences, should not be extended to any other offences but should be reviewed because, while it has succeeded in one objective, namely, an increased severity in sentencing for certain drugs and firearms offences, it has not been established that it has achieved another general aim of the criminal justice system, namely reduced levels of criminality. The Commission notes that, in particular, the presumptive drugs offences regime has had the following results: a discriminatory system of sentencing where all cases are treated alike regardless of differences in the individual circumstances of the offenders; the adaptation of the illegal drugs industry to the sentencing regime by using expendable couriers to hold and transport drugs; that these relatively low-level offenders, rather than those at the top of the drugs industry, are being apprehended and dealt with under the presumptive regime; a high level of guilty pleas in order to avoid the presumptive minimum sentence; and a consequent bulge in the prison system comprising low-level drugs offenders.*

CHAPTER 4 MANDATORY SENTENCES FOR SECOND OR SUBSEQUENT OFFENCES

A Introduction

4.01 This chapter considers those provisions which prescribe a mandatory minimum sentence for second or subsequent offences. There are three examples of this type of provision in Irish law. These concern convictions for second or subsequent offences under the *Criminal Justice Act 2007*, the *Misuse of Drugs Act 1977*,¹ and the *Firearms Acts*.² Before examining these provisions, it is first necessary to consider the rationale for increasing the penalties for second or subsequent offences.

B Increased Penalties for Second or Subsequent Offences

4.02 The Commission observes that the policy of imposing enhanced criminal sanctions on recidivist offenders may be justified on the basis that offenders who have been convicted of a subsequent offence have shown themselves to be less amenable to correction. In this regard, O'Malley observes:

“The differential treatment of repeat offenders is sometimes justified on the ground of incorrigibility... If an offender, despite having been convicted and sentenced in the fairly recent past, has defied the system by repeating the same criminal conduct after his release from prison, he has shown himself more dangerous, more defiant, more culpable or less capable of self-restraint, depending on how his personality is assessed, than a person who has committed many offences before being detected or reported. It seems intuitively acceptable, perhaps even morally necessary, that a person with a previous conviction for a similar offence should be punished more severely than somebody without such a record (though the latter may have previous convictions for unrelated minor offences).”³

4.03 The imposition of enhanced penalties on recidivist offenders may, however, give rise to a number of issues.⁴ First, the offender will have already been punished for the initial offence, for which he or she will most likely have served a term of imprisonment. There is thus a risk that an enhanced criminal sanction for a subsequent offence would result in double punishment for the earlier offence. Second, the fact that a person is a recidivist offender should not detract from the principle that a sentence should be proportionate to the gravity of the offence and the circumstances of the offender. Third, sentencing courts may face a policy dilemma in cases where the offender's record strongly suggests a propensity towards

¹ Section 27(3F) of the *Misuse of Drugs Act 1977*, as inserted by section 84 of the *Criminal Justice Act 2006* and renumbered by section 33 of the *Criminal Justice Act 2007*.

² Section 15(8) of the *Firearms Act 1925*; section 26(8) of the *Firearms Act 1964*; section 27(8) of the *Firearms Act 1964*; section 27A(8) of the *Firearms Act 1964*; section 27B(8) of the *Firearms Act 1964*; and section 12A(13) of the *Firearms and Offensive Weapons Act 1990*, as inserted by section 42, section 57, section 58, section 59, section 60 and section 61 of the *Criminal Justice Act 2006*, respectively.

³ O'Malley “Sentencing Recidivist Sex Offenders: A Challenge for Proportionality” (2008) Paper delivered at Conference on Recent Developments in Criminal Law at Trinity College Dublin in December 2008 and subsequently published in Bacik and Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Firstlaw, 2009) at 106-132.

⁴ O'Malley “Sentencing Recidivist Sex Offenders: A Challenge for Proportionality” (2008) Paper delivered at Conference on Recent Developments in Criminal Law at Trinity College Dublin in December 2008 and subsequently published in Bacik and Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Firstlaw, 2009) at 106-132.

violent offending.⁵ In line with the principle of proportionality, the courts may adhere to the progressive loss of mitigation approach and, while acknowledging the possibility (or probability) that the offender will reoffend, insist that their role is to sentence offenders on the basis of *past* offending. O'Malley asserts, however, that the courts "cannot deny that public protection remains an important consideration in sentencing" and, to some extent, warrants sentencing on the basis of *future* offending.⁶

4.04 Statute, except in very select situations, does not provide guidance as to how recidivist offenders should be sentenced for subsequent offences.⁷ Section 11(1) of the *Criminal Justice Act 1984*, on the one hand, provides that any sentence passed on a person for an offence committed while he or she is on bail must run consecutively to any sentence passed on him or her for the previous offence. Section 13(1) of the *Criminal Law Act 1976*, on the other, provides that any sentence passed on a person for an offence committed while he or she is serving a sentence must run consecutively to the sentence that he or she is serving.

4.05 By contrast, the Irish courts have fluctuated between two approaches. The first relates to the policy of progressive loss of mitigation⁸ which, as O'Malley explains:

"...begins with the assumption that a person without previous convictions should be entitled to mitigation on that account. However, the more convictions the offender accumulates the less mitigation he will deserve until a point is reached where he deserves none at all, at least on the ground of record..."⁹

O'Malley asserts that progressive loss of mitigation is an approach which is "more compatible with the proportionality principle".¹⁰ Previous convictions do not justify a more severe sentence than is warranted by the offence of conviction but, instead, diminish the level of mitigation warranted by a previous good record.

⁵ O'Malley "Sentencing Recidivist Sex Offenders: A Challenge for Proportionality" (2008) Paper delivered at Conference on Recent Developments in Criminal Law at Trinity College Dublin in December 2008 and subsequently published in Bacik and Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Firstlaw, 2009) at 106-132.

⁶ O'Malley "Sentencing Recidivist Sex Offenders: A Challenge for Proportionality" (2008) Paper delivered at Conference on Recent Developments in Criminal Law at Trinity College Dublin in December 2008 and subsequently published in Bacik and Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Firstlaw, 2009) at 106-132.

⁷ O'Malley "Sentencing Recidivist Sex Offenders: A Challenge for Proportionality" (2008) Paper delivered at Conference on Recent Developments in Criminal Law at Trinity College Dublin in December 2008 and subsequently published in Bacik and Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Firstlaw, 2009) at 106-132.

⁸ Fitzgerald's view is that the courts, in general, adhere to this policy. See Fitzgerald "The Usual Suspects: Analysing the Use of Past Criminal Convictions in the Criminal Justice System" (2009) *The Westminster International Law and Theory Centre Online Working Papers* 2009/3.

⁹ O'Malley "Sentencing Recidivist Sex Offenders: A Challenge for Proportionality" (2008) Paper delivered at Conference on Recent Developments in Criminal Law at Trinity College Dublin in December 2008 and subsequently published in Bacik and Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Firstlaw, 2009) at 106-132.

¹⁰ O'Malley "Sentencing Recidivist Sex Offenders: A Challenge for Proportionality" (2008) Paper delivered at Conference on Recent Developments in Criminal Law at Trinity College Dublin in December 2008 and subsequently published in Bacik and Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Firstlaw, 2009) at 106-132.

4.06 The second approach is to treat previous convictions as an aggravating factor, either in terms of adding to the gravity of the offence of conviction or being relevant to personal circumstances which may warrant a more severe sentence than would otherwise be justified.¹¹

4.07 In *People (DPP) v GK*,¹² however, the Court of Criminal Appeal distinguished between “previous good character” and previous convictions:

“This court is satisfied that while previous good character is relevant to the character and circumstances of the accused which may be mitigating factors in terms of sentence previous convictions are relevant not in relation to mitigation of sentence but in aggravation of the offence. Accordingly in determining an appropriate sentence in this case it follows that the learned trial judge was entitled to have regard to the two previous convictions of rape, the fact that the offence was committed within six months of having been released from prison for an offence of rape and the matters disclosed in the Probation Service report. These circumstances are relevant not just in terms of their absence in mitigation of sentence but also in terms of assessing an appropriate sentence in terms of the seriousness of the offence, which sentence will be proportionately more severe than would be the case were these circumstances absent.”

Thus while previous good character was a factor which would mitigate the severity of the sentence, the Court of Criminal Appeal was of the view that previous convictions were a factor which would aggravate the seriousness of an offence.

4.08 The facts of the case were that the applicant had appealed against a sentence of life imprisonment for aggravated sexual assault. The offender had two previous convictions for rape and had committed the present offence 6 months after his release from prison for another rape. The Court referred to the offender’s “previous propensity to re-offend despite his having served quite significant custodial sentences” and concluded that he should be “incapacitated from reoffending for a long time by way of a long term of imprisonment.” In this regard, the Court observed that the courts were entitled to impose an extended sentence in the interest of social protection, in certain limited circumstances such as where the offender had shown a high propensity to reoffend:

“In the case of *People (DPP) v “MS”* [2000] 2 I.R. 592 at 600 and 601, Denham J., held that in cases relating to sexual offences a sentence may incorporate an element of protection of society, something which can sometimes be best achieved by supervised release. If this Court were to impose a sentence for the particular offence only, it would not provide this element of protection where the evidence before the sentencing judge establishes that the applicant has a high propensity to reoffend. However, there is an important balance to be struck here between the obligation of the judicial arm of the State to protect the citizens and in particular the vulnerable citizens of the State and its obligation to vindicate the constitutional rights of the individual even if that individual is a recidivist. In advancing the former *desideratum* the Court cannot disregard the fundamental principle that punishment should be proportionate to the particular offence committed by the particular offender. The applicant cannot be sentenced again for past offences and he cannot be sentenced in anticipation for offences which he has not committed and which he might never in fact commit. The concept of deterrence and of the protection of society, which can be advanced in a number of ways, is a permissible input into sentencing in our jurisprudence... but to a limited extent only consistent with the proportionality principle and must not be conflated with a form of general preventive incarceration which is not part of our jurisprudence. An indeterminate sentence of life imprisonment could not be imposed on a repeat offender solely on this basis.”

It would thus appear that the court was of the view that the imposition of an extended term of imprisonment on a repeat offender was compatible with the principle of sentencing proportionality,

¹¹ O'Malley “Sentencing Recidivist Sex Offenders: A Challenge for Proportionality” (2008) Paper delivered at Conference on Recent Developments in Criminal Law at Trinity College Dublin in December 2008 and subsequently published in Bacik and Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Firstlaw, 2009) at 106-132.

¹² [2008] IECCA 110.

provided that the sentence did not seek to punish the offender again for past offences or in anticipation of future offences that might never occur.

4.09 In its *1996 Report on Sentencing*,¹³ the Commission also adopted the view that previous convictions were relevant to the seriousness of an offence rather than the severity of a sentence. In this regard, it stated:

“[W]hereas, at first sight, previous history seemed irrelevant to offence seriousness, it was certainly relevant to culpability, in that exposure on a previous occasion to the system of sanctions should have brought home to the offender dramatically and personally that his or her criminal conduct was offensive to society. We also noted that this accorded with the approach of the Supreme Court in *Tiernan*.”¹⁴

4.10 The Commission thus recommended that the following provision be included in sentencing guidelines:

“a statutory provision which confines the role of prior criminal record in the determination of the severity of sentence to situations in which it aggravates the culpability of the offender in committing the offence. The provision should highlight the following concerns:

a. The sentencer, in determining the severity of the sentence to be imposed on an offender, may have regard to any offences of which the offender has been found guilty in the past which may be considered to increase the culpability of the offender.

b. In considering whether such prior offences aggravate the culpability of the offender for the offence for which he or she is being sentenced the sentencer should have regard to:

i. the time which has elapsed between the prior offence or offences and the offence for which the offender is being sentenced;

ii. the age of the offender at the time of commission of the prior offence;

iii. whether the prior offence or offences are similar in nature to the offence for which the offender is being sentenced;

iii. whether the prior offence or offences are similar in seriousness to the offence for which the offender is being sentenced.”¹⁵

C Criminal Justice Act 2007

(1) History

4.11 Section 25 of the *Criminal Justice Act 2007* provides that where an individual commits a second or subsequent serious offence in the 7-year period following a first serious offence - for which the person received a sentence of five years or more - the presumptive sentence for the second or subsequent offence is three quarters of the maximum sentence provided by law or 10 years if the maximum sentence is life imprisonment.¹⁶

4.12 The offences to which section 25 applies are set out in Schedule 2 to the 2007 Act.¹⁷ Introducing the provision, the Minister for Justice indicated that the scheduled offences were “among the

¹³ Law Reform Commission *Report on Sentencing* (LRC 53-96).

¹⁴ Law Reform Commission *Report on Sentencing* (LRC 53-96) at paragraph 3.19.

¹⁵ Law Reform Commission *Report on Sentencing* (LRC 53-96) at paragraph 3.20.

¹⁶ Brady “More Prison for Second Offenders” *Irish Independent* 6 March 2007.

¹⁷ The relevant offences are set out in Schedule 2 of the Act: murder; causing serious harm; threats to kill or cause serious harm; false imprisonment; causing explosion likely to endanger life or damage property; possession, etc., of explosive substances; making or possessing explosives in suspicious circumstances; possession of firearm with intent to endanger life; possession of firearms while taking vehicle without authority; use of firearms to assist or aid escape; possession of firearm or ammunition in suspicious circumstances;

most serious known in criminal law” and included “offences typically associated with gangland crime, including, of course, drug-trafficking and firearms offences.”¹⁸ The Minister stated that, in broad terms, these were racketeering offences and that the inspiration for the inclusion of these provisions was the “racketeering-influenced corrupt organization, RICO, legislation in the USA”.¹⁹ He remarked that “these provisions on sentencing are innovative in Irish terms and reflect the need to find new ways to meet the challenge that we face from organised crime.”²⁰

4.13 The *Criminal Justice Bill 2007* was presented to the Dáil in March 2007. The purpose of the Bill, as indicated by the Minister for Justice, was to “send a clear and unambiguous message” that society was “not prepared to allow organised criminal gangs set about the destruction of families and communities.”²¹ The Minister acknowledged that the Bill contained tough measures but indicated that the measures were “both necessary and proportionate to the threat [of] organised crime.”²² McIntyre observes that, at the time, there was also a perception that the criminal justice system had become “unbalanced” in favour of the criminal.²³

4.14 There were a number of events which prompted the introduction of the *Criminal Justice Bill* in 2007. In December 2006, there had been a spate of murders which, the Minister for Justice stated, indicated that “some criminal gangs believed they could act with impunity.”²⁴ In addition, the Balance in the Criminal Law Review Group, which had been established by the Minister in 2006 to examine a wide range of criminal justice areas,²⁵ had just published its interim report.²⁶ The Opposition also referred to two recent reports which had ranked Ireland unfavourably in terms of criminal statistics.²⁷ In February 2007 the EU International Crime Survey had published its 2005 report, *The Burden of Crime in the EU*,²⁸ which found that Ireland ranked highest with regard to the risk of crime, assaults with force, sexual

carrying firearm with criminal intent; shortening barrel of shotgun or rifle; aggravated burglary; drug trafficking offence within the meaning of section 3(1) of the *Criminal Justice Act 1994*; offence of conspiracy; organised crime; commission of offence for criminal organisation; blackmail; extortion; and demanding money with menaces.

¹⁸ Criminal Justice Bill 2007: Second Stage Dáil Debates Vol 634, No 2, Thursday 22 March 2007 Col 383.

¹⁹ Criminal Justice Bill 2007: Second Stage Dáil Debates Vol 634, No 2, Thursday 22 March 2007 Col 384. §1961-68 of the *United States Code*. See Atkinson “Racketeer Influenced and Corrupt Organizations’ 18 USC § 1961-68: Broadest of the Federal Criminal Statutes” (1978) 69 J Crim L & Criminology 1 at 1-2.

²⁰ Criminal Justice Bill 2007: Second Stage, Dáil Debates Vol 634 No 2, Thursday 22 March 2007 Col 384.

²¹ Criminal Justice Bill 2007: Second Stage Dáil Debates Vol 634, No 2, Thursday 22 March 2007 Col 381.

²² Criminal Justice Bill 2007: Second Stage Dáil Debates Vol 634, No 2, Thursday 22 March 2007 Col 382.

²³ McIntyre *Irish Current Law Statutes 2007* at 29-05; McDermott “Has the Time come to recalibrate the Criminal Trial System?” (2007) 101(3) *Law Society Gazette* 14 at 14; Griffin “Tinkering with Due Process Values” (2007) 101(2) *Law Society Gazette* 14 at 15.

²⁴ Criminal Justice Bill 2007: Second Stage Dáil Debates Vol 634, No 2, Thursday 22 March 2007 Col 381; “McDowell’s new Laws are old Promises” *Irish Independent* 15 February 2007; “Draconian Measures ‘are necessary if we are to curb Gang Crime Epidemic’” *Irish Independent* 23 March 2007; Brady “Gangland Killings a National Emergency, say Gardaí” *Irish Independent* 2 April 2007; “Gangland Threat is a National Emergency, Conference told” *Irish Independent* 5 April 2007; Bray “Gangland is flourishing, claims FG” *Irish Independent* 10 April 2007.

²⁵ Notably, mandatory sentencing was not one of these areas.

²⁶ McIntyre *Irish Current Law Statutes 2007* at 29-06.

²⁷ Criminal Justice Bill 2007: Second Stage Dáil Debates Vol 634, No 2, Thursday 22 March 2007 Col 394-395, Mr Jim O’Keeffe, Fine Gael Spokesperson on Justice.

²⁸ Van Dijk, Manchin, van Kesteren, and Hideg *The Burden of Crime in the EU - A Comparative Analysis of the European Survey of Crime and Safety (EU ICS) 2005* (Gallup Europe, 2007).

assaults and robberies.²⁹ At around the same time, the Economic and Social Research Institute of Ireland had published crime figures in its 2007 report, *The Best of Times? The Social Impact of the Celtic Tiger*,³⁰ which suggested that while the rate of lethal violence in Dublin was not out of line with other European capital cities it had “increased dramatically when the international trend [was] downward.”³¹ Arguably, also, the enactment of the *Criminal Justice Act 2006* had exposed a number of criminal justice areas which would require further examination.

4.15 The passage of the 2007 Bill was not without controversy. Due to the fact that the Government had imposed a guillotine on the Dáil debate the Bill passed through the Dáil and the Seanad by 27th April 2007.³² This, it was argued, did not allow sufficient time for the bill to be debated.³³ In particular, it was observed that the Irish Human Rights Commission had not had time to examine the Bill,³⁴ as it was empowered to do by law.³⁵

4.16 In addition, McIntyre notes that the final version of section 25 is a “somewhat watered down” version of that originally proposed.³⁶ In its original form section 25 did not permit of any exception to the mandatory minimum sentence. It was felt, however, that this might lead to disproportionate sentencing. As a result, section 25 was amended so as to permit the court to disregard the mandatory minimum sentence where it would be disproportionate in all the circumstances of the case.³⁷ Furthermore, the original version of section 25 became operable if a prison term of 12 months or more had been imposed for a first offence. It was felt, however, that this was too low a threshold to trigger the mandatory minimum sentence. As a result, section 25 was amended so as to raise the threshold to five years’ imprisonment for the first offence. Finally, the original version of section 25 applied to a broader range of scheduled offences, which included both burglary and robbery. It was observed, however, that the range of scheduled offences went beyond what might be committed by persons engaged in “gangland activities.”³⁸ As a result, section 25 and Schedule 2 were amended so as to remove burglary and robbery from the list of scheduled offences.³⁹

²⁹ Ireland ranked third highest for burglaries and ranked high for car theft and personal theft.

³⁰ Fahey, Russell and Whelan (ed) *Best of Times? The Social Impact of the Celtic Tiger* (IPA, 2007).

³¹ Fahey, Russell and Whelan (ed) *Best of Times? The Social Impact of the Celtic Tiger* (IPA, 2007) at 252; Lally “Dublin Murder Rate is fastest growing” Irish Times 20 March 2007.

³² O’Halloran “Criminal Justice Bill passed in Dáil” Irish Times 25 April 2007.

³³ Collins “Legal Bodies urged to oppose Justice Bill Timing” Irish Times 12 March 2007; “Rushed Legislation” Irish Times 13 March 2007; De Bréadún “Groups criticise ‘rushing through’ of Crime Bill” Irish Times 16 March 2007; O’Regan “McDowell rejects Calls for Time to Debate” Irish Times 30 March 2007; “McDowell’s rushed Bill has more to do with Votes than Crime Fight” Irish Independent 31 March 2007; Donohoe “Unrest triggers Justice Bill Rethink” Irish Times 31 March 2007; “More Debate needed” Irish Times 4 April 2007; Collins “More Time for Justice Bill Debate” Irish Times 6 April 2007; Walsh “Quinn claims Abuse of Power over Justice Bill” Irish Times 27 April 2007.

³⁴ “Rights Watchdog warns of ‘Danger of Injustice’” Irish Times 30 March 2007.

³⁵ *Human Rights Commission Act 2000*.

³⁶ McIntyre *Irish Current Law Statutes Annotated* 2007 at 29-26.

³⁷ Criminal Justice Bill 2007: Report Stage (Resumed) and Final Stage Dáil Debates Vol 636, No 1 Tuesday, 24 April 2007, Col 122-123, Mr McDowell TD, Minister for Justice.

³⁸ Criminal Justice Bill 2007: Report Stage (Resumed) Dáil Debates Vol 635, No 2 Wednesday, 4 April 2007, Col 605, Mr O’Keeffe TD, Spokesperson on Justice for Fine Gael.

³⁹ Criminal Justice Bill 2007: Report Stage (Resumed) Dáil Debates Vol 635, No 2 Wednesday, 4 April 2007, Col 606, Mr McDowell TD, Minister for Justice.

4.17 These amendments were due in no small part to the fact that the Bill had been widely criticised.⁴⁰ The Irish Human Rights Commission, for instance, was of the opinion that the “principles of proportionality and judicial discretion cast some shadow over the constitutionality of section 24”.⁴¹ In a similar vein, the Irish Council of Civil Liberties asserted that section 24 might “impinge upon the constitutional duty of judges to ensure that sentences are proportionate to both the gravity of the crime and the personal circumstances of the offender.”⁴² The Law Society⁴³ and some prominent criminal law practitioners were also quick to voice their concerns regarding proportionality and the separation of powers.⁴⁴ Having consulted the Council of State, the President decided not to refer the Bill to the Supreme Court and signed the Bill into law.⁴⁵

(2) Application

4.18 As discussed at paragraph 4.11, section 25 of the *Criminal Justice Act 2007* introduces a mandatory sentencing regime in respect of serious repeat offenders.⁴⁶ To examine the application of this regime it is necessary to consider first the elements which trigger the mandatory sentence and to consider next the relevant penalty provisions. Each will be considered in turn.

(a) Elements which Trigger the Mandatory Sentence

4.19 In this section the Commission is not concerned with the elements of the various offences listed in Schedule 2 to the *Criminal Justice Act 2007*. These offences are not relevant to the operation of the mandatory sentencing regime except in so far as a second or subsequent conviction for such an

⁴⁰ Lally “Crime Package leaves Gangland untamed” Irish Times 14 February 2007; “Responding to Gangland Crime” Irish Times 15 February 2007; McDonald “Hollow Ring to McDowell’s explosive Bill” Irish Independent 16 March 2007; Kenny “Crime Bill has Opposition nicked” Sunday Independent 18 March 2007; “Gangland Bill is Vote-getting Ploy that betrays Civil Rights” Irish Independent 19 March 2007; “Tackling complex Problem of Crime” Irish Times 11 October 2007.

⁴¹ *Observations on the Criminal Justice Bill 2007* (IHRC, 2007) at 15; “Rushed Criminal Justice Legislation may curtail established Human Rights” (IHRC/Law Society, Press Release, 12 October 2007); “Rights Watchdog warns of ‘Danger of Injustice’” Irish Times 30 March 2007; “IHRC warns Government over rushing Legislation” RTE News 15 October 2007.

⁴² *What’s Wrong with the Criminal Justice Bill 2007?* (ICCL, 2007) at 8; Kelly “Having a real Impact on serious Crime will require wiser Counsel” Irish Independent 14 March 2007.

⁴³ Murphy “Criminal Justice Bill should be withdrawn” Irish Times 29 March 2007;

⁴⁴ “Combating Organised Crime” The Irish Times, 21 February 2007 (Pauline Walley SC, Ivana Bacik BL, Brendan Grehan SC, Paddy McCarthy SC, Anthony Sammon SC, Gerry O’Brien SC, Conor Devally SC, Michael O’Higgins SC, Niall Durnin SC, Aileen Donnelly SC, Sean Gillane BL, Dominic McGinn BL, Caroline Biggs BL, Vincent Heneghan BL, Garret Baker BL, and Siobhán Ní Chulacháin BL); Grehan “Criminal Justice Bill increases Erosion of Civil Rights” Irish Times, 26 April 2007; Molony “McDowell faces Lawyers’ Revolt over Bill” Irish Independent 29 March 2007; “Barristers revolt over new Bill” Irish Independent 29 March 2007; Gartland “McDowell to accept Amendments to Bill” Irish Times 29 March 2007; Collins and Molony “Tánaiste shrugs off angry Law Protests over Bill” Irish Independent 30 March 2007; Clifford “Chickening out of the Fight against Crime” Sunday Tribune 1 April 2007; “Lawyers rally the Troops to fight McDowell’s Anti-Gangland Bill” Irish Independent 9 April 2007; Rogers “Elements of Criminal Justice Bill do not stand up to Scrutiny” Irish Times 4 April 2007; Brady “McDowell Fury at Lawyers” Irish Independent 3 April 2007; “Government faces Wrath of Law on the Double, in Row over Money and Crime” Irish Independent 16 April 2007; “Lawyers to fight ‘Draconian’ Measures in new Crime Bill” Irish Independent 17 April 2007; “McDowell’s Bill will lead to Abuses, Lawyers say” Irish Independent 23 April 2007; Bracken “Irish People ‘apathetic’ about Loss of Civil Rights in the Justice System” Sunday Tribune 14 October 2007.

⁴⁵ De Bréadún “President McAleese signs Criminal Justice Bill into Law” Irish Times 10 May 2007; MacConnell “Council of State to meet over new Justice Bill” Irish Times 7 May 2007; Lavery “President to make Call on Anti-Gang Bill” Sunday Independent 6 May 2007.

⁴⁶ Section 25(1) of the *Criminal Justice Act 2007*.

offence will trigger the mandatory regime. In this regard, the mandatory sentencing regime under section 25 of the *Criminal Justice Act 2007* may be contrasted with the mandatory sentencing regimes under the *Misuse of Drugs Act 1977* and the *Firearms Acts*.

(i) Age

4.20 The first element relates to the age of the offender. Section 25(1) of the *Criminal Justice Act 2007* provides that the offender must be at least 18 years of age on the date of conviction for the initial and subsequent scheduled offence. The intention behind this provision, presumably, was to ensure that no juvenile offender would be affected by the mandatory sentencing regime.⁴⁷ However, the reference to the “date of conviction” means that offenders who were younger than 18 years on the date of *commission* but had attained 18 years by the date of *conviction* might still be caught by the mandatory sentencing regime.

(ii) Initial Scheduled Offence

4.21 The second element relates to the initial offence. Section 25(1)(a) of the *Criminal Justice Act 2007* provides that the offender must have been convicted on indictment of an offence specified in Schedule 2.⁴⁸ In addition, section 25(4) provides that the initial offence may be committed before or after the commencement of section 25. It has thus been observed that in certain circumstances the provision may operate retroactively.⁴⁹

4.22 The offences specified in Schedule 2 may be described as serious offences and are likely to be - although not always - committed by offenders involved in gangland activities. It may be noted, however, that while the *Criminal Justice Act 2007* was intended to respond to gangland activities it neither defines “gangland activities” nor requires that the scheduled offences be committed in connection with such activities. Thus the mandatory sentencing regime may apply regardless of whether there is any connection to gangland activities. Arguably, this does not pose a problem as the scheduled offences are, in and of themselves, sufficiently serious to warrant stringent penalties.

(iii) Sentence of Five Years

4.23 The third element relates to the sentence in respect of the initial scheduled offence. Section 25(1)(b) of the *Criminal Justice Act 2007* provides that the offender must have been sentenced to imprisonment for a term of not less than five years for the initial offence. The intention behind the selection of a five-year threshold was to distinguish between more serious and less serious incidents of the offences specified in Schedule 2. In this regard, the Commission observes that “serious”⁵⁰ and “arrestable”⁵¹ offences are also defined by reference to a five-year period.

⁴⁷ Fitzgerald “Californication of Irish Sentencing Law” (2008) ICLJ 42 at 45.

⁴⁸ The relevant offences are set out in Schedule 2 to the *Criminal Justice Act 2007*: murder; causing serious harm; threats to kill or cause serious harm; false imprisonment; causing explosion likely to endanger life or damage property; possession, etc., of explosive substances; making or possessing explosives in suspicious circumstances; possession of firearm with intent to endanger life; possession of firearms while taking vehicle without authority; use of firearms to assist or aid escape; possession of firearm or ammunition in suspicious circumstances; carrying firearm with criminal intent; shortening barrel of shotgun or rifle; aggravated burglary; drug trafficking offence within the meaning of section 3(1) of the *Criminal Justice Act 1994*; offence of conspiracy; organised crime; commission of offence for criminal organisation; blackmail; extortion; and demanding money with menaces.

⁴⁹ McIntyre *Irish Current Law Statutes Annotated 2007* at 29-26.

⁵⁰ Section 1 of the *Bail Act 1997* defines a “serious offence” as “an offence specified in the Schedule for which a person of full capacity and not previously convicted may be punished by a term of imprisonment for a term of 5 years or by a more severe penalty.”

⁵¹ Section 2 of the *Criminal Law Act 1997* defines an “arrestable offence” as “an offence for which a person of full capacity and not previously convicted may, under or by virtue of any enactment, be punished by imprisonment for a term of five years or by a more severe penalty...”

4.24 The 2007 Act provides, however, that the mandatory sentencing regime will not apply where the sentence for the initial offence has been wholly⁵² or partially⁵³ suspended, or the conviction has been quashed on appeal or otherwise.⁵⁴

(iv) Subsequent Scheduled Offence

4.25 The fourth element relates to the subsequent offence. Section 25(1)(c) of the *Criminal Justice Act 2007* provides that the offender must be convicted on indictment of a subsequent offence specified in Schedule 2. There is no requirement that this offence be related to gangland activities or, indeed, to the initial scheduled offence. Section 25(4) provides, however, that the subsequent offence must have been committed after the commencement of section 25.

4.26 The mandatory sentencing regime does not apply, however, if the second scheduled offence is one which attracts a mandatory minimum sentence.⁵⁵ Thus if the second offence is murder or a drugs or firearms offence which attracts a mandatory minimum sentence the mandatory sentencing provision will not apply.

(v) Within a 7-Year Period?

4.27 The fifth element relates to the time period within which the subsequent scheduled offence must be committed. Section 25(1)(c)(ii) of the *Criminal Justice Act 2007* provides that the subsequent scheduled offence must be committed during the period of 7 years from the date of conviction of the first offence and, for the purpose of determining that period, there shall be disregarded any period of imprisonment in respect of the first offence or the subsequent offence. It would thus appear that the 7-year period relates to the time during which the offender was at liberty after the date of conviction.

4.28 Alternatively, section 25(1)(c)(ii) provides that the offence may be committed during any period of imprisonment in respect of the first or subsequent offence. It would thus appear that in such circumstances the subsequent offence may be committed during a period longer than 7 years depending on the length of the term of imprisonment.

(b) Penalty for Subsequent Scheduled Offence

4.29 Where these elements have been satisfied, section 25 of the *Criminal Justice Act 2007* provides that the court must specify a minimum sentence of not less than three quarters of the maximum term prescribed by law for the second offence or, if the maximum term is life imprisonment, a sentence of not less than 10 years. Thus the nature of the mandatory penalty will very much depend on the nature of subsequent offence.

4.30 However, section 25(3) provides that the mandatory sentence will not apply where the court is satisfied that it would be “disproportionate in all the circumstances of the case” to impose the mandatory minimum sentence. This proviso appears to impose a lower threshold than the “exceptional and specific circumstances” proviso under the *Misuse of Drugs Act 1977* and the *Firearms Acts*. As a result, O’Malley states that the discretionary element “will probably deprive [the provision] of much of [its] punitive bite”⁵⁶ and, in a similar vein, Collins describes it as being “essentially discretionary”.⁵⁷

4.31 It is interesting that the sentencing regime for subsequent offences under the *Criminal Justice Act 2007* refers to the date of conviction of the initial offence rather than the date of commission. This ties

⁵² Section 25(5)(a) of the *Criminal Justice Act 2007*.

⁵³ Section 25(5)(b) of the *Criminal Justice Act 2007*.

⁵⁴ Section 25(6) of the *Criminal Justice Act 2007*.

⁵⁵ Section 25(2) of the *Criminal Justice Act 2007*.

⁵⁶ O’Malley “Sentencing Recidivist Sex Offenders: A Challenge for Proportionality” (2008) Paper delivered at Conference on Recent Developments in Criminal Law at Trinity College Dublin in December 2008 and subsequently published in Bacik and Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Firstlaw, 2009) at 106-132.

⁵⁷ Collins “And Throw Away the Key” (2007) 101(7) *Law Society Gazette* 36 at 38-39.

in with the rationale that the offender should be assessed by reference to his or her previous interaction with the law. If the reference was to the date of commission, the offender might not have had an interaction with the law and therefore might not be expected to have learned from his or her punishment.

(c) Early Release

4.32 The power to grant early release to those who have been convicted of a second scheduled offence under section 25 of the *Criminal Justice Act 2007* has been restricted. Section 25(13) provides that the powers of commutation and remission conferred upon the Government by section 23 of the *Criminal Justice Act 1951* cannot be exercised in respect of a person sentenced for an offence under section 25 of the 2007 Act. Section 25(13) provides, however, that any sentence imposed for an offence under section 25 is subject to ordinary remission for good behaviour which currently stands at one-quarter of the total sentence. Section 25(15) provides that the power to grant temporary release, as conferred by section 2 of the *Criminal Justice Act 1950*, may not be exercised until such time as the power to grant commutation or remission has arisen except “for grave reasons of a humanitarian nature”. Furthermore, the temporary release shall be for such limited period of time as is justified by those reasons. Section 25 does not, however, permit the court to list a sentence for review.

D Misuse of Drugs Act 1977

(1) History

4.33 Section 27(3F) of the *Misuse of Drugs Act 1977*, as amended, provides that where a person, aged 18 years or over, is convicted of a second or subsequent offence under section 15A or section 15B, the court must impose a sentence of not less than the statutory minimum sentence.

4.34 It would appear that section 27(3F) emanated from a Fine Gael proposal to amend the provisions of the *Criminal Justice Bill 2004*⁵⁸ dealing with firearms offences.⁵⁹ The proposed amendment sought to remove the power of the judiciary to impose a sentence of less than the statutory minimum where the offender had been convicted of a second or subsequent offence. After consulting with the Attorney General, the Minister for Justice accepted the amendment.⁶⁰

(2) Application

4.35 A case involving section 27(3F) of the *Misuse of Drugs Act 1977*, as amended, does not appear to have come before the courts as yet. However, a number of general observations may be made.

4.36 Section 27(3F) of the *Misuse of Drugs Act 1977*, as amended, prescribes a mandatory minimum sentence.⁶¹ The mandatory sentence applies where a person has been convicted of two or more offences under section 15A, two or more offences under section 15B or two or more offences under section 15A and section 15B. There is no requirement that a sentence of at least the presumptive minimum term be imposed for the first offence. Arguably, therefore, the first offence could be relatively minor. Neither is there a requirement that the second offence be committed within a certain time frame. Arguably, therefore, a substantial period of time could lapse between the first and second offence.

4.37 The Commission observes that section 27(3E)⁶² stipulates that subsections (3C) and (3D) apply and have effect only in relation to persons convicted of a first offence under section 15A or section 15B. This is interesting in so far as subsection (3D) refers not only to exceptional and specific circumstances which might justify a downward departure from the statutory minimum but also to previous

⁵⁸ The history of the *Criminal Justice Bill 2004* was discussed in Chapter 3.

⁵⁹ Criminal Justice Bill 2004: Committee Stage (Resumed), Wednesday, 3 May 2006, Select Committee on Justice, Equality, Defence and Women’s Rights, Deputy Jim O’Keeffe.

⁶⁰ Criminal Justice Bill 2004: Report Stage (Resumed), Wednesday, 28 June 2006, Dáil Éireann Debate, Vol 622 No 78, Col 1257, Mr McDowell TD.

⁶¹ Murphy “An Analysis of Sentencing Provisions in the Criminal Justice Act, 2006” [2007:1] JSIJ 60 at 76.

⁶² Formerly subsection (3CCC).

convictions and public interest which might, arguably, justify an upward departure from the statutory minimum.

4.38 It would appear, however, that subsection (3G) to subsection (3K) continue to apply and have effect in relation to persons convicted of second or subsequent offences. Thus while the power to grant early release is restricted the power to list a sentence for review is maintained.⁶³

4.39 The mandatory sentence prescribed by section 27(3G) has been described as “constitutionally vulnerable” as it severely constrains judicial discretion.⁶⁴ The Commission observes, however, that judicial discretion in sentencing may not necessarily be a constitutional imperative. In any case, the judiciary retain a certain level of discretion in so far as they may impose a sentence anywhere between the mandatory minimum and the statutory maximum.

E Firearms Acts

(1) History

4.40 The *Firearms Acts* also prescribe a mandatory minimum sentence for persons, aged 18 years or over, convicted for a second or subsequent time of a firearms offence which attracts a presumptive minimum sentence.⁶⁵

4.41 This provision emanated from an amendment proposed by Fine Gael during the Committee Stage debates on the *Criminal Justice Bill 2004*.⁶⁶ The Fine Gael spokesperson on justice, Mr Jim O’Keeffe TD, proposed that the “get-out clause where a person is convicted of a first offence... should not be applied in the case of a second offence.” During the Report Stage, Mr O’Keeffe indicated his belief that:

“A person who got away with it, so to speak, under the exceptional circumstances on a first offence would have received sufficient warning that he or she was teetering on the edge of a minimum mandatory sentence if he or she again had anything to do with firearms.”⁶⁷

Having consulted the Attorney General, the Minister for Justice accepted the amendment.⁶⁸

(2) Application

4.42 The provisions of the *Firearms Acts* prescribe a mandatory minimum sentence.⁶⁹ The mandatory sentence applies where a person has been convicted of two or more firearms offences which attract a presumptive minimum sentence. There is no requirement that a sentence of at least the presumptive minimum term be imposed for the first offence. Arguably, therefore, the first offence could be relatively minor. Neither is there a requirement that the second offence be committed within a certain time frame. Arguably, therefore, a substantial period of time could lapse between the first and second offence.

⁶³ See paragraphs 3.123 to 3.126.

⁶⁴ O’Malley *The Criminal Process* (Round Hall, 2009) at 904; see also *Observations on the Criminal Justice Bill 2007* (IHRC, 2007) at 15; and *What’s Wrong with the Criminal Justice Bill 2007?* (ICCL, 2007) at 8.

⁶⁵ Section 15(8) of the *Firearms Act 1925*; section 26(8) of the *Firearms Act 1964*; section 27(8) of the *Firearms Act 1964*; section 27A(8) of the *Firearms Act 1964*; section 27B(8) of the *Firearms Act 1964*; and section 12A(13) of the *Firearms and Offensive Weapons Act 1990*, as inserted by section 42, section 57, section 58, section 59, section 60 and section 61 of the *Criminal Justice Act 2006*, respectively.

⁶⁶ Criminal Justice Bill 2004: Committee Stage (Resumed), Wednesday, 3 May 2006, Select Committee on Justice, Equality, Defence and Women’s Rights, Deputy Jim O’Keeffe.

⁶⁷ Criminal Justice Bill 2004: Report Stage (Resumed), Wednesday, 28 June 2006, Dáil Éireann Debate, Vol 622 No 78, Col 1259.

⁶⁸ Criminal Justice Bill 2004: Report Stage (Resumed), Wednesday, 28 June 2006, Dáil Éireann Debate, Vol 622 No 78, Col 1257.

⁶⁹ Murphy “An Analysis of Sentencing Provisions in the Criminal Justice Act, 2006” [2007] JSIJ 60 at 76.

4.43 The Commission observes that subsection (7)⁷⁰ of each provision stipulates that subsection (4) to subsection (6)⁷¹ apply and have effect only in relation to persons convicted of a first offence. This is interesting in so far as while subsection (5) refers to exceptional and specific circumstances which might justify a downward departure from the statutory minimum subsection (6) refers to previous convictions and public interest which might, arguably, justify an upward departure from the statutory minimum.

4.44 It would appear, however, that section 27C⁷² of the *Firearms Act 1964* continues to apply and have effect in relation to persons convicted of second or subsequent offences. Thus the power to grant early release to is restricted.

4.45 There has been little in the way of commentary on the mandatory provisions of the *Firearms Acts*.⁷³ It is likely, however, that they would succumb to same criticisms as the provisions of the *Misuse of Drugs Act 1977*. In this regard, the Commission reiterates that judicial discretion in sentencing may not be a constitutional imperative and that, in any case, the judiciary retain a certain level of discretion in so far as they may impose a sentence anywhere between the mandatory minimum and the statutory maximum.

4.46 The Court of Criminal Appeal has considered the mandatory minimum sentence for second or subsequent firearms offences. In *People (DPP) v Clail*⁷⁴, for instance, Finnegan J observed that he was obliged to impose the mandatory minimum sentence even though the previous firearms offence had been committed in 1990.

F Discussion

4.47 The Commission acknowledges that mandatory sentencing regimes for subsequent offences may be open to some criticism. As noted at paragraph 3.127, it has been asserted that mandatory sentencing severely constrains judicial discretion and thereby increases the risk of disproportionate sentencing. In this regard, it may be recalled that neither the *Misuse of Drugs Act 1977* nor the *Firearms Acts* permit of any exception to the mandatory minimum sentence applicable to recidivist offenders. By contrast, the *Criminal Justice Act 2007* provides that the mandatory minimum sentence need not be applied where it would be “disproportionate in all the circumstances of the case”. The Commission thus observes that the argument regarding constraints on judicial discretion is much stronger in relation to the sentencing regimes under the *Misuse of Drugs Act 1977* and the *Firearms Acts* than in relation to the sentencing regime under the *Criminal Justice Act 2007*.

4.48 The Commission notes at paragraph 3.129 that mandatory sentencing causes sentencing discretion to be transferred, in effect, if not in terms of the text of the legislation itself, from the courts to the prosecution and defence. This is particularly evident under the *Misuse of Drugs Act 1977* and the *Firearms Acts* which provide that “no proceedings may be instituted... except by or with the consent of the Director of Public Prosecutions”. Even though the *Criminal Justice Act 2007* does not refer specifically to this requirement, it will, in reality, be up to the DPP to decide whether to institute proceedings for a subsequent scheduled offence subject to the mandatory sentencing regime.

4.49 At paragraph 3.130, it was observed that the *Misuse of Drugs Act 1977* and the *Firearms Acts* created a one-strike rule in relation to certain drugs and firearms offences. Arguably, the mandatory sentencing regimes under the *Misuse of Drugs Act 1977*, the *Firearms Acts* and the *Criminal Justice Act 2007*, applicable to recidivist offenders are more just in so far as they create two-strike rules. Thus an offender who commits an initial offence is theoretically, at least, on notice that he or she will be subject to a mandatory penalty should he or she commit a further offence. By contrast, as will be noted in this

⁷⁰ Subsection (12) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

⁷¹ Subsection (9) to subsection (11) of section 12A of the *Firearms and Offensive Weapons Act 1990*.

⁷² As inserted by section 61 of the *Criminal Justice Act 2006*.

⁷³ Campbell “Responding to Gun Crime in Ireland” (2010) *Brit J Criminology* 414.

⁷⁴ Court of Criminal Appeal 9 February 2009.

chapter, some countries apply a three-strike rule under which the offender has two chances before he or she is subjected to a mandatory penalty.

4.50 However, the Commission notes the confusion regarding the approach to be taken in respect of sentencing for subsequent offences. There is a danger that offenders will be punished twice for one offence and that the sentence imposed for the subsequent offence will not be proportionate to the gravity of the particular crime (and the circumstances of the offender). At the same time there is a concern that the public should be protected from violent and/or dangerous criminals, however, imprisonment on this ground is not permitted in Ireland.

4.51 It has been noted that while the mandatory sentencing regime under the *Criminal Justice Act 2007* applies to a broad range of scheduled offences it does not operate unless a number of elements have been satisfied.⁷⁵ First, both the initial and subsequent scheduled offence must have been committed by a person aged 18 years or older. Second, the initial offence must have attracted a sentence of five years or more. Third, the subsequent offence must have been committed within 7 years of the date of conviction of the initial offence. These elements, Fitzgerald argues, ensure that “a minimal number of offences will actually trigger the mandatory minimum sentence”.⁷⁶ By contrast, the mandatory sentencing regimes under the *Misuse of Drugs Act 1977* and the *Firearms Acts* only require that the offender be 18 years or older. There is thus no requirement as to the sentence which must have been imposed for the initial offence or as to the time limit by which the subsequent offence must be committed.

4.52 At paragraph 3.131, it was observed that the majority of offenders caught for offences under section 15A of the *Misuse of Drugs Act 1977* are low-level offenders. In this regard, it may be recalled that many of these low-level offenders are persons who, suffering from an addiction or other vulnerability, have been cajoled or pressurised into acting as couriers.⁷⁷ There may be circumstances in which such an offender is convicted of a second or subsequent offence for which he or she receives the mandatory penalty. This is less likely to happen under the *Firearms Acts*, except in so far as the offence is a possession offence, and even less likely to happen under the *Criminal Justice Act 2007*. Schedule 2 to the 2007 Act lists offences which, even if committed outside the context of gangland criminality, are high on the criminal calendar. Thus an offender who commits one or more of these offences - and is subject to the mandatory sentencing regime - is unlikely to be anything but a serious offender.

4.53 Furthermore, at paragraph 3.131, it was observed that mandatory sentencing tends to disproportionately affect certain socio-economic and ethnic groups. Arguably, this problem is most likely to arise under the *Misuse of Drugs Act 1977* and least likely to happen under the *Criminal Justice Act 2007*.

4.54 At paragraph 3.132, reference was made to the Rand Corporation report which indicated that mandatory sentencing was not a cost-effective method of reducing drug consumption and/or drug-related crime. In particular, it asserted that it would be more cost-effective to strengthen enforcement under the previous sentencing regime or to increase the treatment of heavy drug-users. In the context of the *Misuse of Drugs Act 1977*, this argument is equally forceful in relation to the mandatory sentencing regime for subsequent offences as it is in relation to the presumptive sentencing regime for first offences. Potentially, a similar argument might be made in respect of sentencing for offences under the *Firearms Acts* and the *Criminal Justice Act 2007*.

4.55 At paragraph 3.133, it was noted that there may be an incongruence between the presumptive sentence of 10 years under the *Misuse of Drugs Act 1977* and the presumptive sentence of five years, or in some cases 10 years, under the *Firearms Acts*. The same argument might be made in respect of the mandatory sentencing regimes for subsequent convictions for those offences under the *Misuse of Drugs Act 1977* and the *Firearms Acts*.

⁷⁵ Fitzgerald “Californication of Irish Sentencing Law” (2008) ICLJ 42 at 45.

⁷⁶ Fitzgerald “Californication of Irish Sentencing Law” (2008) ICLJ 42 at 45.

⁷⁷ The same might not be said of the majority of offenders under the *Firearms Acts* except in so far as the particular offence is a possession offence.

4.56 At paragraph 3.199, it was observed that mandatory sentencing may not be a sufficiently sophisticated response to the complex issues which contribute to certain types of offence. Arguably, this argument is stronger in relation to certain offences under the *Misuse of Drugs Act 1977* and the *Firearms Acts*.

4.57 In paragraph 1.26, it was noted that commentators have questioned whether mandatory sentences or, indeed, lengthy prison sentences are a deterrent. It might be argued that the fact that the *Misuse of Drugs Act 1977* and the *Firearms Acts* create a second level of mandatory sentencing to deal with offenders who have committed a subsequent offence of the type subject to a presumptive sentence lends weight to the argument that, in many cases, mandatory sentences do not deter. Similarly, it might be argued that the fact that the *Criminal Justice Act 2007* creates a mandatory sentencing regime to deal with offenders who have committed a second offence of the type subject to a lengthy prison sentence lends weight to the argument that, in many cases, lengthy prison sentences do not deter either.

4.58 As against this, however, it has been asserted that the potential offender population comprises at least two broad categories, the smaller of which comprises those who are less amenable to being deterred. In this regard, Gabor and Crutcher observe:

“The evidence on deterrence suggests that the potential offender population comprises at least two broad groups. Society at large, including more casual offenders, is seen as showing some rationality in the decision to commit crimes and the form such crimes will take. This rationality extends to an awareness of and consideration of risk, including penal sanctions. The second and smaller group is more enmeshed in criminality as a career or lifestyle. Such individuals are more antisocial, less concerned about the consequences of their actions, and less fearful of legal sanctions, including prisons.”⁷⁸

4.59 Arguably, the mandatory provisions for second or subsequent offences under the *Misuse of Drugs Act 1977*, the *Firearms Acts* and the *Criminal Justice Act 2007* are primarily aimed at this “smaller group” which comprised those who are less about the risk of incurring a criminal sanction.

4.60 These provisions may also be prone to a number of general criticisms in respect of mandatory sentencing. As noted at paragraph 3.277, these provisions may result in more people being sent to prison for longer periods of time. In addition, as noted at paragraph 3.278, these provisions may be too rigid to evolve with changing penal philosophy.

G Comparative Analysis

(1) Northern Ireland

4.61 While Northern Ireland has a mandatory sentencing regime in respect of certain firearms and “serious” offences, it does not appear to have a mandatory sentencing regime in respect of subsequent offences.

(2) England and Wales

4.62 As noted at paragraph 3.210, section 110 of the *Powers of the Criminal Courts (Sentencing) Act 2000* obliges the courts to impose a minimum sentence of 7 years where the offender has been convicted of a *third* class A drug trafficking offence.

4.63 As noted at paragraph 3.223, section 111 of the *Powers of the Criminal Courts (Sentencing) Act 2000* provides that where a person is convicted of a *third* domestic burglary the court must impose a minimum sentence of three years, except where there are particular circumstances which relate to the offences or the offender which would make it unjust to do so in all the circumstances.

⁷⁸ Gabor and Crutcher “Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures” rr2002-1e (Research and Statistics Division, Department of Justice of Canada, 2002) at 29.

(3) Scotland

4.64 As noted at paragraph 3.232, section 205B of the *Criminal Procedure (Scotland) Act 1995* provides that where a person is convicted of a *third* class A drug trafficking offence the court must impose a minimum sentence of 7 years, where the offender is aged 21 years or more, and a minimum term of detention of 7 years, where the offender is aged 18 years or under 21 years.

4.65 As noted at paragraph 3.228, section 51A(1A) of the *Firearms Act 1968* provides for a mandatory sentencing regime in respect of certain firearms offences.

(4) United States

4.66 In 1993, an initiative was placed on the ballot in the state of Washington to require a term of life imprisonment without the possibility of parole for persons convicted for a third time of certain specified violent or serious felonies.⁷⁹ This action was fuelled by the death of Diane Ballasiotes, who was murdered by a convicted rapist who had been released from prison. Shortly thereafter, Polly Klass was kidnapped and murdered by a California-released inmate, who also had an extensive prior record of violence. The three-strikes movement caught on, not only with Washington and California voters, who passed their ballot measures by wide margins, but with legislatures and the public throughout the country. By 1997, 24 other states and the Federal government had enacted laws using the three-strikes phrase.

4.67 It has been observed, however, that there is diversity among the states in terms of their three-strike provisions.⁸⁰ First, the vast majority of states include on their list of strikeable offences violent felonies such as murder, rape, robbery, arson and assaults. Some states have included other non-violent charges as well. There are also variations in the number of strikes needed to be out, with two strikes bringing about some sentence enhancement in 8 states.⁸¹ California's law is unique in that it allows for any felony to be counted if the offender has a prior initial conviction for its list of strikeable crimes. The laws also differ regarding the length of imprisonment that is imposed when the offender strikes out, although most are designed to incapacitate the offender for long periods of time.⁸² These range from mandatory life sentences with no possibility of parole when "out" (Georgia, Montana, Tennessee, Louisiana, South Carolina, Indiana, New Jersey, North Carolina, Virginia, Washington and Wisconsin) to parole after a significant period of incarceration (California, Colorado and New Mexico). A number of states have enacted laws enhancing the possible penalties for multiple convictions for specified serious felonies but leave the actual sentence to the discretion of the court (Connecticut, Kansas, Arkansas and Nevada) while others provide a range of sentences for repeat offenders that can extend up to life imprisonment when certain violent offences are involved (Florida, North Dakota, Pennsylvania, Utah and Vermont).

4.68 Furthermore, it has been observed that in the majority of states the three-strikes legislation does not close any loophole in the law but rather targets a population already covered by existing laws.⁸³ In this regard, Austin et al state:

"In summary, from a national perspective the 'three strikes and you're out' movement was largely symbolic. It was not designed to have a significant impact on the criminal justice system. The laws were crafted so that in order to be 'struck out' an offender would have to be

⁷⁹ Austin, Clark, Hardyman and Henry "Three Strikes and You're Out: The Implementation and Impact of Strike Laws" (US Department of Justice, 2000) at 1; See also Jones and Newburn "Three Strikes and You're Out" (2006) 46 *Brit J Criminol* 781 at 783.

⁸⁰ Austin, Clark, Hardyman and Henry "Three Strikes and You're Out: The Implementation and Impact of Strike Laws" (US Department of Justice, 2000) at 5.

⁸¹ Austin, Clark, Hardyman and Henry "Three Strikes and You're Out: The Implementation and Impact of Strike Laws" (US Department of Justice, 2000) at 5.

⁸² Austin, Clark, Hardyman and Henry "Three Strikes and You're Out: The Implementation and Impact of Strike Laws" (US Department of Justice, 2000) at 5-6.

⁸³ Austin, Clark, Hardyman and Henry "Three Strikes and You're Out: The Implementation and Impact of Strike Laws" (US Department of Justice, 2000) at 6.

convicted two or more, often three times for very serious, but rarely committed crimes. Most states knew that very few offenders have more than two prior convictions for these types of crimes. More significantly, all of the states had existing provisions which allowed the courts to sentence these types of offenders to very lengthy prison terms. Consequently, the vast majority of the targeted offender population was already serving long prison terms for these types of crimes. From this perspective the three strikes law movement is much ado about nothing and is having virtually no impact on current sentencing practices.”⁸⁴

(a) California

4.69 It has been observed that there are two - nearly identical - versions of the California strike law.⁸⁵ The first, found in the *California Penal Code* §667(b)-(j), was passed by the legislature and signed into law by the governor on 7 March 1994. The second, found in §1170.12 of the *Penal Code*, was enacted by voters as Proposition 184 on 8 November 1994.

4.70 The legislative version of the law was initially introduced in the California legislature on 1 March 1993 but no action was taken on the bill during the 1993 session.⁸⁶ Meanwhile, after adjournment of the 1993 legislative session, a petition began to circulate among voters to include a proposition on the November 1994 ballot that would, by voter initiative, enact the three strikes law. While the petition was circulating, a three-strike bill was reintroduced in the 1994 legislative session. This was done in an attempt to circumvent the voters’ initiative which was seen as more difficult to amend if passed. (Under California law, voter initiatives can only be amended by a vote of the electorate or by two-thirds vote of each house of the legislature).

4.71 By the time the bill had passed, enough signatures had been collected to qualify Proposition 184 for the November ballot.⁸⁷ The only difference between the two versions of the law was that the voter initiative did not state explicitly, as does the legislature’s version, that juvenile adjudications and out-of-state prior convictions are to be counted as strikes.

4.72 Two provisions in the California law make it one of the most severe in the country.⁸⁸ First, the law provides for a greatly expanded “strike zone” or charges that constitute a strike. The strike zone for the first two strikes is similar to that in other states - serious and violent felonies. The third strike in California, however, is any felony - a provision found in no other state’s strike laws. Persons with two or more convictions for qualifying offences, who are convicted of a third felony, of any kind, are to be sentenced to an indeterminate term of life imprisonment. The minimum term is calculated as the greater of: (1) three times the term otherwise provided for the current conviction; (2) 25 years; or (3) the term provided by law for the current charge plus any applicable sentence enhancements.

4.73 Second, the California law contains a two-strike penalty in which a person convicted of any felony who has one prior conviction for a strikeable offence is to be sentenced to double the term provided for the offence and must serve at least 80 percent of the sentence before being released from prison.⁸⁹ Under California’s criminal code, non-strike inmates typically serve less than half their sentence.

⁸⁴ Austin, Clark, Hardyman and Henry “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (US Department of Justice, 2000) at 7-8.

⁸⁵ Austin, Clark, Hardyman and Henry “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (US Department of Justice, 2000) at 16. See also Zimring, Hawkins, and Kamin *Punishment and Democracy – Three Strikes and You’re Out in California* (Oxford University Press, 2001).

⁸⁶ Austin, Clark, Hardyman and Henry “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (US Department of Justice, 2000) at 16-17.

⁸⁷ Austin, Clark, Hardyman and Henry “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (US Department of Justice, 2000) at 17.

⁸⁸ Austin, Clark, Hardyman and Henry “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (US Department of Justice, 2000) at 17.

⁸⁹ Austin, Clark, Hardyman and Henry “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (US Department of Justice, 2000) at 18.

Only six other states have two strike provisions, all of which limit the offences that trigger a strike penalty to those that are serious or violent.

4.74 The law was designed to limit the discretion of system officials by prohibiting plea bargaining. Also, if the offender is to be sentenced as a second or third striker, the law mandates that the court may not grant probation, suspend the sentence, place the offender on diversion, or commit the offender to any facility other than a state prison. Even with these explicitly stated limitations on discretion, the law conveys a great deal of authority to the prosecutor to determine the ultimate sentence that the offender will receive if convicted.⁹⁰ While the law requires that the prosecution provide evidence of each prior conviction for a qualifying offence, it permits the prosecutor to discount a prior conviction for a qualifying offence if there is insufficient evidence to prove the prior conviction, or if the prosecutor believes that a two or three strike sentence would not be in furtherance of justice. It is this latter clause that allows individual district attorneys throughout the state of California to establish their own policies on how the law should be applied.

4.75 In terms of its crime preventive effects, Gabor and Crutcher observe that:

“While [California] experienced a sharper decline than other states following the law’s implementation, communities in California showed inconsistent effects. Also, studies comparing states with and without such law showed no difference in their crime trends. Reasons given for the lack of a more pronounced effect of such sweeping laws include their inconsistent application, the small number of individuals to whom these laws apply, and the possibility that the most serious and persistent offenders already tend to be serving long sentences under existing legislation.”⁹¹

4.76 The three-strike rule is contained in §667(e) of the *Penal Code*. §667(e)(1) provides that if a defendant has one prior felony conviction, the determinate term or minimum term for an indeterminate term will be twice the term otherwise provided as punishment for the current felony conviction. §667(e)(2)(A) provides that if a defendant has two or more prior felony convictions as defined in subdivision (d), the term for the current felony conviction will be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions; (ii) imprisonment in the state prison for 25 years; or (iii) the term determined by the court pursuant to section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with section 1170) of Title 7 of Part 2, or any period prescribed by section 190 or section 3046.

4.77 It is also contained in §1170.12(c) of the *Penal Code*. §1170.12(c)(1) provides that if a defendant has one prior felony conviction, the determinate term or minimum term for an indeterminate term will be twice the term otherwise provided as punishment for the current felony conviction. §1170.12(c)(2)(A) provides that if a defendant has two or more prior felony convictions, as defined in paragraph (1) of subdivision (b), the term for the current felony conviction will be an indeterminate term of life imprisonment with a minimum term of the indeterminate sentence calculated as the greater of (i) three times the term otherwise provided as punishment for each current felony conviction subsequent to the two or more prior felony convictions; (ii) imprisonment in the state prison for 25 years; or (iii) the term determined by the court pursuant to section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with section 1170) of Title 7 of Part 2, or any period prescribed by section 190 or section 3046.

⁹⁰ Austin, Clark, Hardyman and Henry “Three Strikes and You’re Out: The Implementation and Impact of Strike Laws” (US Department of Justice, 2000) at 18-19.

⁹¹ Gabor and Crutcher “Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures” rr2002-1e (Research and Statistics Division, Department of Justice of Canada, 2002) at 13.

4.78 In addition, §667.7 of the *Penal Code* prescribes a sentencing regime for habitual offenders.⁹² §667.7(a)(1) provides that a person who served two prior separate prison terms will be punished by imprisonment in the state prison for life and will not be eligible for release on parole for 20 years, or the term determined by the court pursuant to section 1170 for the underlying conviction, including any enhancement applicable under Chapter 4.5 (commencing with section 1170) of Title 7 Part 2, or any period prescribed by section 190 or section 3046, whichever is the greatest. §667.7(a)(2) provides that any person convicted of a felony specified in this subdivision who has served three or more prior separate prison terms for the crimes specified in subdivision (a) of this section shall be punished by imprisonment in the state prison for life without the possibility of parole. §667.7(b) provides that no prior prison term will be used for this determination which was served prior to a period of 10 years in which the person remained free of both prison custody and the commission of an offence which results in a felony conviction.

4.79 Furthermore, §667.71 of the *Penal Code* prescribes a sentencing regime for habitual sexual offenders. §667.71(a) provides that an habitual sexual offender is a person who has been previously convicted of one or more of the offences specified in subdivision (c) (rape, lewd or lascivious act, sexual penetration, sexual abuse etc) and who is convicted in the present proceeding of one of those offences. §667.71(b) provides that an habitual sexual offender will be punished by imprisonment in the state prison for 25 years to life.

(b) Georgia

4.80 In November 1994, voters in Georgia approved by an 81 percent to 19 percent margin a ballot measure amending the state's sentencing laws to require that any person convicted on two occasions for the following crimes would be sentenced to life imprisonment without the possibility of parole: murder, armed robbery, kidnapping, rape, aggravated child molestation, aggravated sodomy and aggravated sexual batter.

4.81 The law took effect on 1 January 1995 and supplemented pre-existing Georgia law that contains the following two provisions for repeat offenders:

“Upon the second conviction for any felony, the offender may, at the discretion of the judge, be sentenced to ‘undergo the longest period of time prescribed for the punishment of the subsequent offence’ for which the offender is convicted.

Upon the fourth conviction for any felony, the offender must serve the maximum time imposed, and not be eligible for parole until the maximum time has been served.”

⁹² §667.7(a) provides that a “habitual offender” is any person convicted of a felony in which the person inflicted great bodily injury... or personally used force which was likely to produce great bodily injury, who has served two or more prior separate prison terms... for the crime of murder; attempted murder; voluntary manslaughter; mayhem; rape by force, violence or fear of immediate and unlawful bodily injury on the victim or another person; sodomy by force, violence or fear of immediate and unlawful bodily injury on the victim or another person; lewd acts on a child under the age of 14 years by force, violence or fear of immediate and unlawful bodily injury on the victim or another person; a violation of subdivision (a) of section 289 where the act is accomplished against the victim's will by means of force, violence or fear of immediate and unlawful bodily injury on the victim or another person; kidnapping as punished in former subdivision (d) of section 208, or for ransom, extortion, or robbery; robbery involving the use of force or a deadly weapon; carjacking involving the use of a deadly weapon; assault with intent to commit murder; assault with a deadly weapon; assault with a force likely to produce great bodily injury; assault with intent to commit rape, sodomy, oral copulation, sexual penetration in violation of section 289, or lewd and lascivious acts on a child; arson of a structure; escape or attempted escape by an inmate with force or violence in violation of subdivision (a) of section 4530, or of section 4532; exploding a destructive device with intent to murder in violation of section 12308; exploding a destructive device which causes bodily injury in violation of section 12309, or mayhem or great bodily injury in violation of section 12310; exploding a destructive device with intent to injury, intimidate or terrify, in violation of section 12303.3; any felony in which the person inflicted great bodily injury as provided in section n12022.53 or 12022.7; or any felony punishable by death or life imprisonment with or without the possibility of parole.

4.82 The law was also changed to require that persons convicted of any one of the strikeable offences for the first time would be sentenced to a mandatory minimum term of 10 years, with no possibility of parole or early release, thus creating a one-strike provision.

4.83 The Georgia law differs from California's two strikes provision in a number of ways. It includes fewer offences as strikes. It requires that all strikes be limited to the 7 major offences listed at paragraph 4.81, as opposed to California where any subsequent felony conviction can amount to a strike. The second strike in Georgia leads to life imprisonment without parole while the second strike in California results in doubling the presumptive sentence and limiting the amount of good-time credit an inmate can earn. The Georgia law has a mandatory minimum penalty for first strikers.

4.84 With respect to Washington, discussed below, Georgia's law is different in that the life sentence is imposed after a second strike rather than after a third strike, but the list of strikeable offences in Georgia is also much shorter.

4.85 Soon after the law was adopted, litigation was filed challenging the constitutionality of the statute, claiming that it constituted cruel and unusual punishment and that it violated due process and equal protection requirements. On 3 June 1996 the Georgia Supreme Court upheld the law against these challenges.

4.86 The two-strike rule is contained in §17-10-7 of the *Penal Code*. §17-10-7(a) provides that any person convicted of a felony offence and sentenced to confinement in a penal institution who afterwards commits a felony punishable by confinement in a penal institution, shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offence of which he or she stands convicted, provided that, unless otherwise provided by law, the trial judge may, in his or her discretion, probate or suspend the maximum sentence prescribed for the offence.

4.87 §17-10-7(b)(2) provides that any person who has been convicted of a serious violent felony and who after such first conviction subsequently commits and is convicted of a serious violent felony for which such person is not sentenced to death shall be sentenced to imprisonment for life without parole. Any such sentence of life without parole shall not be suspended, stayed, probated, deferred or withheld, and any such person sentenced pursuant to this paragraph shall not be eligible for any form of pardon, parole, or early release administered by the State of Board Pardons and Paroles or for any earned time, early release, work release, leave, or any other sentence-reducing measures under programs administered by the Department of Corrections, the effect of which would be to reduce the sentence of life imprisonment without the possibility of parole, except as may be authorised by any existing or future provisions of the Constitution.

4.88 §17-10-7(c) provides that any person who, after having been convicted for three felonies, commits a felony within Georgia shall, upon conviction for such fourth offence or for subsequent offences, serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served.

(c) Washington

4.89 Austin et al assert that Washington state represents most states, in that its law produced a rather narrow strike zone which required three strikes.⁹³ By contrast California and Georgia broaden the strike zone and/or lower the threshold to a two-strike criteria.

4.90 Officially entitled the *Persistent Offender Accountability Act 1994* the Washington strike law requires that any person convicted for the third time of a specified offence is to receive a mandatory sentence of life in prison without the possibility of parole.⁹⁴

4.91 Despite its limited use, the strike law has been challenged in court on several grounds.⁹⁵ The Washington Supreme Court upheld the constitutionality of the law, rejecting claims that it violated the

⁹³ Austin, Clark, Hardyman and Henry "Three Strikes and You're Out: The Implementation and Impact of Strike Laws" (US Department of Justice, 2000) at 15.

⁹⁴ Austin, Clark, Hardyman and Henry "Three Strikes and You're Out: The Implementation and Impact of Strike Laws" (US Department of Justice, 2000) at 15.

'separation of powers' by removing discretion from prosecutors and judges, that it constituted cruel and unusual punishment by mandating life sentences with no possibility of parole, and that it violated equal protection and due process provisions of the state and federal constitutions.

(5) Canada

4.92 As noted at paragraphs 3.251 to 3.257, the *Criminal Code* provides for a mandatory sentencing regime in respect of certain offences involving firearms or other weapons. There does not appear to be a mandatory sentencing regime in respect of second or subsequent offences.

(6) Australia

(a) Northern Territory

4.93 As noted at paragraph 3.263, section 121 of the *Domestic and Family Violence Act* prescribes a minimum sentence of 7 days for a *second or subsequent* breach of a domestic violence order.

(b) Western Australia

4.94 In Western Australia mandatory sentencing laws were enacted in November 1996⁹⁶ which state that when convicted for the *third time or more* for a home burglary, offenders must be sentenced to a minimum of 12 months imprisonment. This is regardless of the gravity of the offence. The law was intended to reduce the incidence of domestic burglary however research has revealed that the laws have had no impact on burglary rates.⁹⁷

(7) New Zealand

4.95 The *Sentencing and Parole Reform Act 2010* creates a three-stage regime of increasing consequences for repeat serious violent offenders.

4.96 There are 40 qualifying offences comprising all major violent and sexual offences, including murder, attempted murder, manslaughter, wounding with intent to cause grievous bodily harm, sexual violation, abduction, kidnapping and aggravated robbery. The full list can be found in section 86A of the *Sentencing Act 2002*.

4.97 A first warning is issued when an offender aged 18 or over at the time of the offence, and who does not have any previous warnings, is convicted of a qualifying offence. Once an offender has received a first "strike" warning, it stays on his or her record for good (unless his or her conviction is quashed by an appellate court).

4.98 If the offender is subsequently convicted of another qualifying offence he or she receives a final warning and, if sentenced to imprisonment, will serve that sentence in full without the possibility of parole. The first and final warnings will stay on the offender's record.

4.99 On conviction of a third qualifying offence the court must impose the maximum penalty for the offence. The court must also order that the sentence is to be served without parole, unless the court considers that would be manifestly unjust.

H Conclusions and Provisional Recommendations

4.100 As noted in Chapter 2, the Supreme Court has ruled that the Oireachtas is entitled to prescribe a mandatory minimum sentence whenever it considers that a mandatory minimum sentence is an appropriate penalty.⁹⁸ It thus follows that the Oireachtas is entitled to prescribe a mandatory minimum sentence for second or subsequent offences whenever it considers that such a sentence is an

⁹⁵ Austin, Clark, Hardyman and Henry "Three Strikes and You're Out: The Implementation and Impact of Strike Laws" (US Department of Justice, 2000) at 15.

⁹⁶ Amendment of the Criminal Code (WA) 1913.

⁹⁷ Sentencing Guidelines Around the World (Scottish Sentencing Commission, 2006) at 7.

⁹⁸ *Deaton v Attorney General* [1963] IR 170, 181; and *State (P Woods) v Attorney General* [1969] IR 385, 403-404.

appropriate penalty. It remains to be seen, however, whether it would be advisable for the Oireachtas to extend the use of mandatory minimum sentences for second or subsequent offences to offences other than firearms, drugs and serious offences, as defined by the *Criminal Justice Act 2007*.

4.101 As discussed at Section F, mandatory sentencing is open to a number of significant criticisms which militate against extending their use to other offences. The Commission is thus of the view that their use should be confined to as few situations as possible.

4.102 Arguably, it should be shown that the introduction of a mandatory sentencing regime is the only option, all other options having been examined first. This should entail an examination of the existing sentencing regime and, if improvement is found to be necessary, how that regime might be improved. At very least, it should be shown, by means of empirical research, how a mandatory sentencing regime is likely to yield better results than the existing regime in terms of reducing crime.⁹⁹

4.103 It is thus not sufficient to argue that a mandatory sentencing regime would result in more repeat offenders being imprisoned and, therefore, prevented from committing further crimes. An increase in the number of people being imprisoned will exacerbate the current problem of prison-overcrowding and will impede the criminal justice system from pursuing the general aims of criminal sanctions.

4.104 In addition, it must be shown how a mandatory sentencing regime will reduce crime, in terms of deterrence or reform and rehabilitation. If the justification is deterrence - which is usually the case - then it must be shown how the mandatory sentencing regime will deter individual offenders and the public at large. As deterrence is likely to be affected by both the severity of the sentence and the probability of being caught, it must be shown, in particular, how the mandatory sentencing regime will meet these requirements. Furthermore, as noted in paragraph 1.26, there are a number of other factors which might affect the deterrent effect of a criminal sanction.

4.105 In terms of reform and rehabilitation, it is unlikely that a mandatory sentencing regime would be justified on this basis. A possible argument would be that an offender could be reformed and rehabilitated during a period of imprisonment. This argument is weak, however, when regard is had to the current levels of prison-overcrowding and under-resourcing.

4.106 The Commission considers, therefore, that there are significant reasons to lead to the conclusion that there should be no extension of the existing statutory framework concerning the imposition of mandatory sentences (and, where relevant, presumptive mandatory sentences) for second or subsequent offences. Indeed, these reasons are comparable to those already discussed by the Commission in connection with the presumptive regime for drugs and firearms offences. Nonetheless, the Commission also considers that, as a general proposition, a statutory framework that takes account in sentencing of repeat offending is consistent with the general aims of the criminal justice system and principles of sentencing set out in Chapter 1.

4.107 *The Commission provisionally recommends that the existing legislation concerning mandatory sentences (and, where relevant, presumptive mandatory sentences) as it applies in the case of second and subsequent offences should not be extended to any other offences; but the Commission also considers that, as a general proposition, a statutory framework that takes account in sentencing of repeat offending is consistent with the general aims of the criminal justice system and principles of sentencing set out in this Consultation Paper.*

⁹⁹ Gabor and Crutcher "Mandatory Minimum Penalties: Their Effects on Crime, Sentencing Disparities, and Justice System Expenditures" rr2002-1e (Research and Statistics Division, Department of Justice of Canada, 2002) at 29.

CHAPTER 5 SUMMARY OF PROVISIONAL RECOMMENDATIONS

5.01 The provisional recommendations made by the Commission in this Consultation Paper are as follows.

5.02 The Commission supports the recommendations made in 2000, and reiterated in 2011, that the proposed Judicial Council be empowered to develop and publish suitable guidance or guidelines on sentencing which would reflect the general aims of criminal sanctions and the principles of sentencing discussed in this Consultation Paper. The Commission also provisionally recommends that such guidance or guidelines should have regard to: the sentencing guidance and guidelines available from decisions of the Supreme Court and the Court of Criminal Appeal, including those discussed in this Consultation Paper; the aggravating and mitigating factors, and individual offender characteristics, identified in the Commission's 1996 Report on Sentencing, as developed by the courts since 1996; and information in relevant databases, notably the Irish Sentencing Information System (ISIS). [Paragraph 1.249]

5.03 The Commission provisionally recommends that, while the use of the entirely mandatory sentence may, having regard to the aims of criminal sanctions and the principles of sentencing, be appropriately applied to the offence of murder, the mandatory sentencing regime for murder should be amended to provide that, on the date of sentencing, the court should be empowered to indicate or recommend that a minimum specific term of imprisonment should be served by the defendant, having regard to the particular circumstances of the offence and of the offender. [Paragraph 2.112]

5.04 The Commission provisionally recommends that the presumptive sentencing regime, as it applies in the case of certain drugs and firearms offences, should not be extended to any other offences but should be reviewed because, while it has succeeded in one objective, namely, an increased severity in sentencing for certain drugs and firearms offences, it has not been established that it has achieved another general aim of the criminal justice system, namely reduced levels of criminality. The Commission notes that, in particular, the presumptive drugs offences regime has had the following results: a discriminatory system of sentencing where all cases are treated alike regardless of differences in the individual circumstances of the offenders; the adaptation of the illegal drugs industry to the sentencing regime by using expendable couriers to hold and transport drugs; that these relatively low-level offenders, rather than those at the top of the drugs industry, are being apprehended and dealt with under the presumptive regime; a high level of guilty pleas in order to avoid the presumptive minimum sentence; and a consequent bulge in the prison system comprising low-level drugs offenders. [Paragraph 3.283]

5.05 The Commission provisionally recommends that the existing legislation concerning mandatory sentences (and, where relevant, presumptive mandatory sentences) as it applies in the case of second and subsequent offences should not be extended to any other offences; but the Commission also considers that, as a general proposition, a statutory framework that takes account in sentencing of repeat offending is consistent with the general aims of the criminal justice system and principles of sentencing set out in this Consultation Paper. [Paragraph 4.107]



The Law Reform Commission is an independent statutory body established by the *Law Reform Commission Act 1975*. The Commission's principal role is to keep the law under review and to make proposals for reform, in particular by recommending the enactment of legislation to clarify, modernise and consolidate the law.

This role is carried out primarily under a Programme of Law Reform. The Commission's *Third Programme of Law Reform 2008-2014* was prepared and approved under the 1975 Act following broad consultation and discussion. The Commission also works on specific matters referred to it by the Attorney General under the 1975 Act. The Commission is also involved in making legislation more accessible through Statute Law Restatement, the Legislation Directory and the Classified List of Legislation in Ireland. Statute Law Restatement involves the administrative consolidation of all amendments to an Act into a single accessible text. The Legislation Directory is a searchable annotated guide to legislative changes. The Classified List of Legislation in Ireland comprises all Acts of the Oireachtas that are in force, organised under 36 major subject-matter headings.

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The Law Reform Commission is a statutory body established by the Law Reform Commission Act 1975